EDITOR'S NOTE

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No. 85-732-ASX
Status: GRANTED

Docketed:
October 29, 1985

Title: Western Air Lines, Inc., et al., Appellants
v.
Board of Equalization of the State of South Dakota, et al.

Court: Supreme Court of South Dakota

Counsel for appellant: Rasenberger, Raymond J.

Counsel for appellee: Meierhenry, Mark V.

Entry	Date	Note	Proceedings and Orders
1	Oct 29 1985	G	Statement as to jurisdiction filed.
2	Dec 4 1985		DISTRIBUTED. January 10, 1986
3	Dec 19 1985	R	Response requested.
4	Jan 18 1986		Motion of appellees Board of Equalization, SD, et al. to dismiss or affirm filed.
5	Jan 22 1986		REDISTRIBUTED. February 21, 1986
6	Feb 10 1986	X	Reply brief of appellants Western Air Lines, et al. filed.
7	Feb 24 1986		PROBABLE JURISDICTION NOTED.
			**********
9	Mar 15 1986		Order extending time to file brief of appellant on the merits until April 30, 1986.
0	Apr 18 1986		Record filed.
1	Apr 30 1986		Brief amicus curiae of Air Transport Assn. of America filed.
2	Apr 30 1986		Joint appendix filed.
3	Apr 30 1986		Brief of appellants Western Air Lines, et al. filed.
4	Apr 30 1986		Brief amicus curiae of Railway Progress Institute, et al. filed.
6	May 12 1986		Order extending time to file brief of appellee on the merits until June 30, 1986.
7	Jun 30 1986		Brief of appellee Brd. of Equalization, SD filed.
8	Jul 15 1986		CIRCULATED.
9	Sep 3 1986		SET FOR ARGUMENT. Monday, November 3, 1986. (1st case) (1 hour)
0	Oct 20 1986	X	Reply brief of appellants Western Air Lines, et al. filed.
1	Nov 3 1986		ARGUED.

85-732

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; and OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court Of the State of South Dakota

JURISDICTIONAL STATEMENT

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54

QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property of the same type." The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 1513(d)(2)(D). Does this definition permit a state to escape § 1513(d)'s prohibition by wholly exempting business property from taxation, while simultaneously imposing a tax on air carrier transportation property?

PARTIES TO THE PROCEEDING

Appendix E-1, *infra,* 24a, lists the parties below. Plaintiffs included, in addition to the appellants here, Continental Airlines Corporation. The names of individual defendants, all of whom were sued only in their capacities as state or county officials, are not listed.

STATEMENT OF CORPORATE AFFILIATIONS

Parent companies, less than wholly owned subsidiaries, and affiliates of any of the appellant airlines are:

(a) Ozark Air Lines, Inc., is wholly owned by Ozark Holdings, Inc.

(b) Frontier Airlines, Inc., is wholly owned by Frontier Holdings, Inc., whose corporate parents are RKO Enterprises of Ohio, Inc., RKO Enterprises, Inc., and GenCorp, Inc., and whose subsidiaries are Frontier Horizon, Frontier Services Company, Frontier Development Group, Inc., Leasco, Inc., and Colorado Aerotech, Inc. In addition, Peoples Express Airlines recently has agreed to buy Frontier Holdings, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1985

No. 85-

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (App. A, *infra*, 1a) is reported at 372 N.W. 2d 106 (1985). The decision of the Circuit Court for the Sixth Judicial Circuit of South Dakota (App. B., *infra*, 13a) is unreported.

JURISDICTION

The judgment of the Supreme Court of South Dakota (App. C, *infra*, 22a), sustaining the validity of the South Dakota Airline Flight Property Tax (S.D. Codified Laws Ch. 10-29) against a challenge based on the Constitution (U.S. Const. art. VI, cl.2) and laws (49 U.S.C. § 1513(d)) of the United States, was entered on July 31, 1985. The notice of

appeal (App. D, *infra,* 23a) was filed with the South Dakota Supreme Court on October 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appendix E-3, *infra,* 27a, sets forth pertinent portions of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 1513(d).

B. South Dakota Codified Laws, Sections 10-4-6.1; 10-6-33; 10-6-34.1; 10-29-8.

C. U.S. Const. art. VI, cl.2 (the Supremacy Clause).

STATEMENT OF THE CASE

In the proceedings below, four interstate air carriers providing commercial service to airports in South Dakota challenged as violative of federal law taxes imposed upon their property by the State of South Dakota for the years 1982 and 1983. Their challenge ultimately was rejected by the South Dakota Supreme Court and this appeal followed.

1. Operation Of South Dakota's Airline Flight Property Tax

In 1961 South Dakota imposed upon airlines serving South Dakota a centrally assessed property tax, *i.e.,* assessed by the State's Department of Revenue, rather than by local county or city taxing authorities. 1961 S.D. Sess. Laws Ch. 449, S.D. Codified Laws §§ 10-29-2, -8. Each aircraft used in South Dakota was valued at a percentage of its total value, the percentage being determined by the proportion of the airline's total operations (measured by flight time, revenue ton miles, and tonnage of passengers and freight received and discharged) conducted within the State. S.D. Codified Laws § 10-29-10. The aircraft so valued were then assessed at up to 60%

and taxed at the average mill rate paid on all property, both real and personal, within the State. S.D. Codified Laws §§ 10-6-33, -34.1; -29-14. Appeals from the department's assessment were to be taken first to the State Board of Equalization and then to a state circuit court. S.D. Codified Laws §§ 10-29-11, -11-43. The taxes so determined were allocated for collection to each county containing an airport served by the airline, and were to be used exclusively for such airports. S.D. Codified Laws § 10-29-15.

When the airline flight property tax was enacted in 1961, South Dakota also taxed other business-related personal property. But this tax was repealed in 1978. After that date all personal property that was not centrally assessed was classified for ad valorem tax purposes and was exempted from taxation. S.D. Codified Laws § 10-4-6.1. Central assessment—and thus taxation—was retained for property of public service companies, such as airlines, railroads, telephone and telegraph companies, electric utilities, and pipeline companies.[1]

2. Origin of the Federal-State Conflict

In 1982 the Congress determined that several specified taxing practices of the states "unreasonably burdened and discriminated against interstate commerce," and amended the Airport Development Acceleration Act of 1973 to forbid such practices. 49 U.S.C. 1513(d).[2] This 1982 amendment prohibited a state from assessing air carrier transportation property at a higher proportion of market value than the assessment ratio applied to "other commercial and industrial property of the same type," or from levying or collecting a tax based on such a discriminatory assessment. The states also were forbidden to levy or collect an ad valorem property tax at a rate exceeding the tax rate applied to other commercial and industrial property of the same type. 49 U.S.C. § 1513(d)(1); App. E-3, *infra,* 27a.

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[1] S.D. Codified Laws §§ 10-6-34.1, -29-2, -28-1, -33-10, -34-8, -35-2, -37-9.

[2] This amendment, adding Subsection (d) to Section 7 of the Airport Development Acceleration Act, was enacted as § 532 of the Airport and Airway Improvement Act of 1982. Pub. L. No. 97-248, 96 Stat. 671, 701.

3. Proceedings Below

Based on this new federal statute, four airlines—Western, Republic, Ozark and Frontier—applied for abatement and refund of property taxes paid to South Dakota for the year 1982. App. B, *infra,* 13a. Soon thereafter the same airlines challenged the assessment made against their property for 1983 by the State Board of Equalization. *Id.* at 13a-14a.[3] The airlines contended that South Dakota's airline flight property tax violated 49 U.S.C. § 1513(d) because the state statute assessed and taxed their personal property, while most other commercial and industrial property in the state was wholly exempt from taxation. *Id.* at 18a.

The 30 refund suits for 1982 and the 12 appeals from the board of equalization for 1983 all were consolidated for hearing by the Circuit Court for the Sixth Judicial Circuit in Hughes County, South Dakota. *Id.* at 14a. In April 1984 the circuit court issued a single opinion and judgment disposing of all 42 cases. App. B, *infra,* 13a.

The circuit court believed itself "not required to delve into the issue of whether this tax is burdensome or discriminatory." *Id.* at 21a. Instead the circuit court sustained the state's tax as an "in lieu" tax specifically permitted under the federal statute. *Id.* at 20a.[4]

On appeal a divided South Dakota Supreme Court affirmed the judgment, but on a different basis. *Western Airlines, Inc. v. Hughes County,* 372 N.W. 2d 106 (S.D. 1985); App. A, *Infra,* 1a. The court unanimously held that the circuit court had erred in sustaining the airline flight property tax as an "in lieu" tax. 372 N.W. 2d at 109, 111; App. A. *infra,* at 6a, 9a. While not denying the tax's discriminatory effect, the supreme court nonetheless upheld the tax on a theory that neither was raised by the State in its answer to the various complaints nor considered by the trial court.

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[3] The State in 1983 imposed on the four appellant airlines property taxes totalling $179,303. App. E-2, *infra,* 26a. Continental Airlines was a party in the court below, but has not joined in this appeal.

[4] Section 1513(d)(3) specifically permits a state to impose upon an air carrier "any in lieu tax which is wholly used for airport and aeronautical purposes." App. E-3, *infra,* 28a.

Section 1513(d)(2)(D) defines "commercial and industrial property" as property "devoted to commercial or industrial use *and subject to a property tax levy*" (emphasis added). Since noncentrally assessed business property was exempt from taxation (S.D. Codified Laws § 10-4-6.1), the court reasoned that this property was not "commercial and industrial property" within the meaning of § 1513(d) because it was not "subject to a property tax levy." 372 N.W.2d at 110; App. A, *infra.* 7a. Thus the court held that § 1513(d) precluded consideration of this tax-exempt property for discriminatory ratio or rate comparison.

The dissenting judge criticized the majority's opinion as permitting a "greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate." 372 N.W. 2d at 112; App. A, *infra,* 10a. He agreed fully with the contrary result reached by the North Dakota Supreme Court in *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W. 2d 515 (N.D. 1984). Section 1513(d) required, in his opinion, that "since the level of assessment on commercial and industrial property is zero, the level of assessment on the airlines' personal property must be reduced to zero." 372 N.W. 2d at 112, App. A, *infra,* 11a.

All four airlines filed a notice of appeal on October 9, 1985, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2). App. D, *infra,* 23a.

THE QUESTION IS SUBSTANTIAL

The 1982 amendment to the Airport Development Acceleration Act was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 10 n. 13 (1983). No one disputes that the 1982 amendment (49 U.S.C. § 1513(d)) would prohibit South Dakota from taxing other commercial and industrial property at 5 cents or 25 cents or even 45 cents per $100 of assessed value, while at the same time taxing air carrier property (as the State did in 1983) at a rate of 54.34 cents. App. E-2, *infra,* 26a. But the South Dakota Supreme Court

upheld the state's discriminatory tax on air carrier property because other commercial and industrial property, rather than being taxed at a lower rate, was totally exempted from taxation.

This construction of the statute totally defeats its Congressional purpose, and would expose interstate carriers to a substantial risk of discriminatory taxation in states such as New York, Illinois, Massachusetts, and Pennsylvania that now exempt personal property from taxation. *See, infra,* 6-12. The South Dakota decision also conflicts squarely with that of the North Dakota Supreme Court, which read § 1513(d) to invalidate the identical discrimination when imposed by that state's tax laws. *See, infra,* 13-14. The resolution of this conflict will affect not only 92 certificated commercial air carriers, but also 397 railroads and more than 34,000 motor carriers that enjoy an identically worded federal immunity from discriminatory taxation against their more than $76 billion in property. *See, infra,* 11-12.[5]

I. THE DECISION BELOW EVISCERATES AN IMPORTANT FEDERAL STATUTE INTENDED TO FORBID IMPOSITION OF DISCRIMINATORY PROPERTY TAXES ON INTERSTATE CARRIERS.

A. Section 1513(d) Prohibits Discriminatory Taxation of Air Carrier Property.

In *Aloha Airlines, supra,* this Court struck down Hawaii's tax on an airline's gross receipts because that tax was one of a "proliferation of local taxes" that Congress had found "burdened interstate air transportation and, when coupled with the federal Trust Fund levies, imposed double taxation on air carriers." 464 U.S. at 9. The Court recognized that Sec. 7 of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, was intended to "pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." *Id.* at 9 (quoting from *Evansville-Vanderburgh Airport Authority Dist. v. Delta Air*

[5] Railroads, unlike air and motor carriers, also enjoy an additional federal prohibition against "any other [state] tax which results in discriminatory treatment...." *See, infra,* note 17.

Lines, Inc., 405 U.S. 707, 721 (1972)). Local airport expansion and improvements instead were to be financed through the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970 (Pub. L. No. 91-258, § 208, 84 Stat. 250 (1970)) and funded by revenues from several federal aviation taxes. *Id. See generally, Massachusetts v. United States,* 435 U.S. 444, 448 (1978).

The Airport and Airway Improvement Act of 1982 authorized significant funding increases to improve both airports and air navigation facilities. S. Rep. No. 494, Vol. 2, 97th Cong., 2d. Sess., reprinted in 1982 U.S. Code Cong. Ad. News 1156, 1157. Block grants to the states of $428 million were authorized over a six year period to improve small commercial and general aviation airports. *Id.* at 1158. Congress at the same time "amended 49 U.S.C. § 1513 to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, supra,* 464 U.S. at 10 n. 13. *See* Airport and Airway Improvement of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 701 (1982).

The 1982 amendment to § 1513 specifically declared certain property tax practices to "burden and discriminate against interstate commerce." 49 U.S.C. § 1513(d). The amendment prohibited discriminatory state taxation of airline property by making applicable to air carriers the already existing prohibitions against discriminatory taxation of motor carrier property. H. R. Rep. No. 760, 97th Cong., 2d. Sess., 722, reprinted in 1982 U.S. Code Cong. & Ad. News 1190, 1484. The amendment to § 1513 thus copied verbatim from § 31(a)(1) of the Motor Carrier Act of 1980 [6] language to forbid assessing or taxing airline property at ratios or rates higher than other commercial and industrial property. App. E-3, *infra,* 27a.

The legislative history of § 31(a)(1) of the Motor Carrier Act and of its predecessor in § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act") fill in

[6] Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823 (1980), as amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102 (1982) (49 U.S.C. § 11503a).

any gaps regarding the legislative intent of § 1513(d).[7] Section 31(a)(1) of the Motor Carrier Act was intended to outlaw "the assessment, levying or collecting of taxes on motor carrier property in a manner different from that of other commercial and industrial property . . . ." S. Rep. No. 411, 97th Cong., 2d. Sess. 30, reprinted in 1982 U.S. Code Cong. & Ad. News 2308 2337. The statute provided that "States may not tax at a level which unreasonably burdens or discriminates against interstate commerce." *Id.* The President of the Transportation Association of America ("TAA") testified that the legislation would "prevent state or local governments from assessing or taxing transportation property of ICC regulated bus lines on a discriminatory basis, *as compared to other business property* . . . ." (emphasis added) [8]

The antidiscrimination language of the Motor Carrier Act was substantially copied in turn from § 306 of the 4-R Act (49 U.S.C. § 11503),[9] whose legislative history reveals Congress' intent even more starkly. Congress was told that the definitions used in this Act had "been worded to make it perfectly clear that the carriers are . . . treated on the same basis as other industrial and commercial taxpayers." [10] The Act was designed to "mak[e] it unlawful, as an undue burden on interstate

[7] The statutory language itself and one paragraph from the already cited H. R. Rep. No. 97-760 constitute all of § 1513(d)'s explicit legislative history.

[8] *Deregulation of the Intercity Bus Industry: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 218 (1982).

[9] Sec. 20 of the 1982 Bus Regulatory Reform Act, amending the Motor Carrier Act to forbid discriminatory taxation of interstate bus lines, was described as "a carry-through of similar TAA-developed legislative language included in the Rail 4-R Act and the Motor Carrier Act of 1980. . . ." *Bus Regulatory Reform: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 97 Cong., 1st Sess. 455 (1981). *See, in addition, id.* at 194.

[10] *Railroad-1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 94 Cong., 1st Sess. 2150 (1975) (testimony of TAA). The language being described was that of a working draft of the bill that became the 4-R Act, and is reproduced at *id.*, 1507, 1553-55. This legislative language was developed by TAA. *See, supra*, note 9.

commerce, for a state or local tax authority to assess or tax on a discriminatory basis the transportation property of carriers subject to ICC regulation." [11]

Section 306 of the 4-R Act was the culmination of Congressional efforts to prohibit a "variety . . . . of discriminatory treatment in the assessing and taxing of railroads' properties by state and local governments," including specifically the practice of "classifying carrier property in a separate class from all other taxable property . . . ." [12] Congress' action was designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property . . . ." (*Id.* at 2).[13]

The South Dakota statutes classifying airline flight property as taxable (S.D. Codified Laws §§ 10-6-34.1, -29-8) while classifying other commercial and industrial personal property as tax exempt (S.D. Codified Laws § 10-4-6.1) constitute exactly the kind of discrimination against interstate carriers that 49 U.S.C. §§ 1513(d), 11503, and 11503a intended to prohibit. These taxes thus may not constitutionally be imposed upon the appellant airlines. *Aloha Airlines, supra.*

[11] *Id.* at 2150. The working draft being described at these hearings did not yet contain the catch-all prohibition against all other discriminatory taxes on railroads that later was added to the bill and enacted as part of § 306. See 49 U.S.C. § 11503(b)(4). *Id.* at 1837 (testimony of Stephen Ailes, President, Association American Railroads) and 1883 (testimony of Stuart H. Johnson, Counsel for New York Dock Railway).

[12] S. Rep. No. 630, 91st Cong., 1st Sess. 17, 18 (1969) (Letter from the Interstate Commerce Commission). This Court had held in *Nashville, C. & S.L. Railway v. Browning*, 310 U.S. 362 (1940), that such differing classification did not violate the equal protection clause of the Fourteenth Amendment.

[13] "The legislative history of these prior bills provide great insight into Congress' intent in passing [49 U.S.C.] § 11503;" the courts thus properly may "rely on the legislative histories of these prior bills . . . in interpreting § 11503." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865, n. 6 (9th Cir. 1983), *cert denied*, 464 U.S. 846 (1983). *Accord Arizona v. Atchison T. & S.F.R. Co.*, 656 F.2d 398, 404 n. 6 (9th Cir. 1981); *Burlington N.R. Co. v Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 971 (1984); *Atchison T. & S.F.R. Co. v Lennen*, 732 F.2d 1495, 1497 (10th Cir. 1984).

B. The Court Below Misconstrued § 1513(d) To Reach a Result Diametrically Opposed To Congress' Intent.

The South Dakota Supreme Court ignored the history of § 1513(d) and its predecessors, and misconstrued the statute to condone exactly the kind of discriminatory tax classification the statute was designed to prohibit. The court held that business property exempt from taxation was not "subject to a property tax levy," and thus was excluded from § 1513(d)'s definition of "commercial and industrial property." 372 N.W. 2d at 110; App. A, *infra*, 7a. By these magical semantics, all noncentrally assessed property was made to disappear, at least insofar as § 1513(d) was concerned. Since the court was unable to find in South Dakota any commercial and industrial property taxed at a lower rate than airline property, § 1513(d) had not been violated, and thus South Dakota's airflight property tax could be preserved. 372 N.W. 2d at 108; App. A, *infra*, 9a.

This construction of § 1513(d) is "plainly at variance with the policy of the legislation as a whole." *Ozawa v. United States*, 260 U.S. 178, 194 (1922). The South Dakota Supreme Court should have appraised "the purpose as a whole of Congress in analyzing the meaning of clauses or sections. . . ." *United States v. American Trucking Assoc.*, 310 U.S. 534, 544 (1940); *accord United States v. Morton*, 104 S. Ct. 2769 (1984). The actual discriminatory effect of the state's tax structure must be considered, for only by so doing can the courts render a decision "faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979).

Upholding South Dakota's "absolute" discrimination against airline property (372 N.W. 2d at 112; App. A, *infra*, at 10a) is wholly contrary to the purpose and history of § 1513(d). The "subject to a tax levy" language of § 1513(d)(2)(D) was intended to recognize only such traditional exemptions as those for charitable property.[14] This definition was not intended to transmogify the statute into one

[14] The federal statutes were "not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of

(footnote continues)

that outlawed partial, but permitted total, discrimination against air carrier property.

The South Dakota Supreme Court so misconstrued § 1513(d) as to eviscerate the air carriers' important federal protection against discriminatory state property taxes. It reached this result only by ignoring both the statute's legislative history and this Court's prior decisions. This Court thus should note probable jurisdiction to review the substantial federal question raised by this erroneous decision.

II. THE SOUTH DAKOTA DECISION, IF NOT REVERSED, COULD ADVERSELY AFFECT ALL INTERSTATE CARRIERS IN MANY ECONOMICALLY SIGNIFICANT STATES.

If the South Dakota court's erroneous construction of § 1513 remains unreversed by this Court, it will expose the property of all interstate carriers to significant risks of discriminatory taxation. Other states, including New York, Illinois, Massachusetts, and Pennsylvania, exempt commercial and industrial personal property from state taxation.[15] The South Dakota decision invites each of those states to impose a discriminatory tax not only on airline property, but on all the property of all other interstate carriers. Their facilities and property represent "nonvoting, often non-resident, targets for local taxation" and thus are "easy prey for state and local tax assessors." S. Rep. 630, 91st Cong., 1st Sess. 3 (1969).

This risk of discriminatory taxation affects more than just the operating property of the 92 interstate air carriers with a net value of approximately $24.6 billion.[16] As already noted, the

(footnote continued)

real property, tangible personal property, and intangible property . . ., [or to] restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like." S. Rep. No. 630, 91st Cong., 1st Sess. 11 (1969). *See, in addition, Arkansas-Best Freight System, Inc. v. Lynch*, 723 F.2d 365 (4th Cir. 1983).

[15] See N.Y. Real Property Tax Laws § 300 (McKinney 1980); Mass. Ann. Laws ch. 59 § 5 (Michie/Law. Co-op. 1982); Ill. Rev. Stat. § 81-1 (1979); 72 Pa. Cons. Stat § 3243.

[16] *Air Carrier Financial Statistics*, U.S. Dept. of Transportation, ii, 73, 113 (as of Dec. 31, 1984).

antidiscrimination provisions of § 1513(d) were copied verbatim from the earlier statutes applicable to motor carriers and to railroads. All three statutes use the same definition of "commercial and industrial property," i.e., nontransportation and nonagricultural property "devoted to a commercial or industrial use and subject to a property tax levy." [17] Thus review of the decision below is of vital concern not only to the 92 certificated interstate air carriers, but also to 397 interstate railroads, with operating property valued at well over $43 billion;[18] more than 34,000 interstate trucking firms with more than $7.6 billion in operating property;[19] and 3,175 interstate bus lines with operating property of more than $665 million.[20] The decision below thus also warrants review by the Court because that decision exposes the total $76 billion property of all interstate surface and air carriers to a significant risk of discriminatory taxation.

III. THE SOUTH DAKOTA DECISION DIRECTLY CONFLICTS WITH A DECISION BY THE HIGHEST COURT OF ANOTHER STATE.

As the dissenting judge noted (372 N.W. 2d at 112; App. A, *infra*, 10a), just eight months earlier the Supreme Court of North Dakota held that "assessing and taxing airline property while exempting other commercial and industrial property is

[17] *Compare* 49 U.S.C. § 1513(d)(2)(D) *with* 49 U.S.C. § 11503(a)(4) and 11503a(a)(4). Section 306 of the 4-R Act contains an additional prohibition not found in § 1513(d) (airlines) or § 11503a (motor carriers) against a state imposing "any other tax which results in discriminatory treatment of a common carrier by railroad . . ." 90 Stat. 54. In *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981) *cert. denied*, 454 U.S. 1086 (1981), the court held a state statute invalid under this catch-all provision, making it unnecessary to reach the definitional question decided by the South Dakota Supreme Court in this case.

[18] Net investment only for the 32 Class I railroads (i.e., railroads with annual operating revenues exceeding $50 million). *ICC 84*, Interstate Commerce Commission Annual Report, 122 (1982). Though 49 U.S.C. § 11503 uses the same definitions as § 1513(d), the practical impact on the railroads of the South Dakota decision may be lessened because of the catch-all prohibition of 49 U.S.C. § 11503(b)(4). *See supra*, n. 17.

[19] Net investment only for the 1,088 Class I motor carriers of property. (Annual operating revenue exceeding $5 million.) "ICC 84" *supra*, at 122.

[20] Net investment only for the 64 Class I motor carriers of passengers (annual operating revenue exceeding $3 milion). *Id.*

prohibited by 49 U.S.C. § 1513(d)." *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W. 2d 515, 517 (N.D. 1984). Relying on this Court's opinion in *Aloha Airlines, supra*, the North Dakota Supreme Court discerned, and gave effect to "the intent of Congress . . . to prohibit discriminatory state taxes because of the adverse affect of such discrimination on interstate commerce." 372 N.W. 2d at 112. The North Dakota court specifically rejected the argument that tax exempt business property was excluded from the § 1513(d)(2)(D) definition of "commercial and industrial property" because such property was not "subject to a property tax levy." [21] *Id.* The court explained:

> Interpreting 49 U.S.C. § 1513(d) as the State would have us do would permit greater discrimination when the property is completely exempt than when it is taxed at a lower rate. That is unreasonable. We have repeatedly held that statutes must be construed to avoid ludicrous and absurd results.

Id.

This Court should review the decision below in order to resolve the irreconcilably conflicting interpretations of § 1513(d) by the highest courts of North Dakota and South Dakota.

IV. THIS COURT IS THE ONLY FEDERAL TRIBUNAL AVAILABLE TO AIRLINES CONTESTING STATE PROPERTY TAXES AS VIOLATIVE OF THE ANTIDISCRIMINATION PROVISIONS OF § 1513(d).

The appellant airlines seek, as interstate carriers, to avail themselves of an important federal statutory protection against state-imposed discrimination. Their ability to assert this protection in the lower federal courts is severely limited, however, by the Tax Injunction Act, 28 U.S.C., § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax

[21] The North Dakota Supreme Court agreed with that of South Dakota, however, in holding that the challenged property taxes were not "in lieu" taxes permissible under § 1513(d)(3). 358 N.W.2d at 518.

> under State law where a plain, speedy and efficient remedy may be had in the state courts.

This statute, although deferring to the states' needs for efficient administration of their tax laws, was not intended to preclude federal review of asserted state infringement of federal rights, but merely to establish the manner and time of that review—i.e., appellate review by this Court after decision by the highest state court.[22] The House Judiciary Committee Report on § 1341 recognized the need for a federal forum when it stated:

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first instance to the United States district courts.

H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3(1937).

In observing the limitations of the Tax Injunction Act, this Court has noted the availability of such appellate review and has assured litigants that if the taxpayer proceeds unsuccessfully through a state court system, he may then "assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Company v. Huffman,* 319 U.S. 293, 301 (1943). *See, in addition, Arizona v. New Mexico,* 425 U.S. 794, 797(1976), where this Court abstained from ruling on a tax controversy between two states until the asserted federal question had been considered by the appropriate state courts.

But the adequacy of the appellants' remedy depends on this Court's accepting jurisdiction over their appeal. Appellants have followed the prescribed course within South Dakota's tax appeal system and have been rebuffed. Only in this Court may appellants find a federal forum in which to vindicate the

[22] Air carriers, unlike railroads and motor carriers, may not challenge discriminatory state taxes in the federal district courts. See 49 U.S.C. §§ 11503(c) and 11503a(c).

important federal protection conferred upon them by § 1513(d).

CONCLUSION

For these reasons, the Court should note probable jurisdiction in this case. Indeed, we respectfully suggest that the decision of the South Dakota Supreme Court so clearly misconstrued 49 U.S.C. § 1513(d) as to warrant summary reversal.

Respectfully submitted,

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October, 1985

APPENDIX

7/31/85

APPENDIX A

IN THE

Supreme Court of the State of South Dakota

WESTERN AIR LINES, INC.,
a corporation, *et al.*,

Plaintiffs and Appellants,

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,

Defendants and Appellees.

Appeal From The Circuit Court Of The
Sixth Judicial Circuit Hughes County, South Dakota
Honorable Robert A. Miller Judge

R. C. RITER and
ROBERT C. RITER, JR., of
RITER, MAYER, HOFER & RITER
Pierre, South Dakota

Attorneys for plaintiffs and appellants.

JOHN DEWELL
Assistant Attorney General
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On the brief:

MARK V. MEIERHENRY
Attorney General
Pierre, South Dakota

Attorneys for defendants and appellees.

Argued October 23, 1984

MORGAN, *Justice.*

The question raised by this appeal is whether 49 U.S.C. § 1513(d) amending the Airport Development Acceleration Act of 1973, preempts SDCL ch. 10-29, Taxation of Airline Flight Property (tax). The appeal involves the various actions of five airlines, Western Air Lines, Republic Airlines, Frontier Airlines, Ozark Air Lines and Continental Airlines (airlines) seeking redress for 1982 taxes assessed by the Department of Revenue of the State of South Dakota (Department) and paid under protest to the various counties of Brown, Beadle, Davison, Hughes, Pennington, Minnehaha, Codington, and Yankton. It also involves an appeal from the State Board of Equalization's denial of a petition to exempt the airlines' flight property from 1983 taxes. Forty-two cases in all were consolidated by stipulation and order of the trial court below. At the pertinent times, the airlines were authorized to and did transact business in South Dakota as air carriers. The trial court affirmed the Department on the appeal, entered judgment for the counties on the suits for rebate, and dismissed airlines' actions on their merits. Airlines appeal and we affirm.

Prior to 1961, any airline operating in South Dakota was only taxed for property located in the state, for fuel purchased in the state, and for the privilege of landing in the state but aircraft were not taxed. In 1961, Chapter 449 of the Session Laws of 1961, the Airline Flight Property Tax, was enacted. Codified as SDCL ch. 10-29, the tax provided for central assessment by Department of all airline flight property used in South Dakota.[1] The legislation further provided that airline flight property should not be otherwise taxed. SDCL 10-29-2. The assessments are based on the value and use of airline flight property which actually provides service in the state. The three use factors involved in the assessment are set out in SDCL 10-29-10. The revenues realized by the tax are allocated to the airports used by the airline companies and are to be exclusively used for airport purposes, as determined by the local airport governing bodies and approved by the Department of Transportation. SDCL 10-29-15.

[1] SDCL 10-29-1(4) provides: " 'Flight property' means all aircraft fully equipped ready for flight used in air commerce[.]"

The airlines have been paying the tax without protest from its inception or from their entry into the state, whichever comes later, until 1982 when they paid under protest, and suits were commenced for their recovery per SDCL 10-27-2.

In enacting Chapter 72 of the 1978 Session Laws entitled "An Act to provide for the repeal of personal property tax," the legislature, after classifying and exempting certain personal property described as personal effects, household furnishings, home appliances, and sporting and hobby goods, provided that "[p]ersonal property as defined in [SDCL] 10-4-6 *which is not centrally assessed* is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation." (Emphasis added.) The Act further provided: "The exemptions created by this Act shall not impair or repeal any tax or fee which heretofore has been authorized to be levied or imposed in lieu of personal property tax." S.D. Sess.L. ch. 72, § 9. These two provisions are now codified as SDCL 10-4-6.1.

In 1982, the United States Congress amended the Airport Development Acceleration Act of 1973. A new section, codified at 49 U.S.C. § 1513(d), generally prohibits burdensome and discriminatory taxation of air carrier transportation property. Specifically, § 1513(d) provides that states may not assess air carrier transportation property at a higher ratio to true market value than the ratio used to assess other commercial and industrial property; or levy or collect an ad valorem property tax on airflight property at a rate in excess of the rate applied to other commercial and industrial property in the same jurisdiction. 49 U.S.C. § 1513(d)(1). The 1982 amendment contains an exception to its preemption of state taxes on airflight property. 49 U.S.C. § 1513(d)(3) provides: "This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

The trial court determined that SDCL ch. 10-29 meets the requirements of 49 U.S.C. § 1513(d)(3), concluding as a matter of law that the tax imposed, being an in lieu tax under the provisions of SDCL 10-4-6.1 used solely for airport and aeronautical purposes, SDCL 10-29-15, does not violate the provisions of 49 U.S.C. § 1513(d) and is an appropriate tax upon the airlines under state and federal law.

The airlines raise two issues on their appeal. First, is the tax imposed by SDCL ch. 10-29 "in lieu" of another valid tax so as to be authorized under 49 U.S.C. § 1513(d)(3)? Second, does the airline flight property tax imposed under SDCL ch. 10-29 discriminate against appellant airlines and is it violative of 49 U.S.C. § 1513(d)(1)?

The basic issue before us is whether the tax conflicts with § 1513(d) and thus violates the supremacy clause. Our inquiry is based on the assumption that, "absent the clear and manifest intent of Congress, the reserved powers of the States are not superseded by federal legislation." Lead-Deadwood School Dist. v. Lawrence Cty., 334 N.W.2d 24, 25 (S.D. 1983). The full enactment of § 1513(d) reads as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> (B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (2) In this subsection—
>
> (A) "assessment" means valuation for a property tax levied by a taxing district;
>
> (B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

> (C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board owned or used by an air carrier providing air transportation;
>
> (D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and
>
> (E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.
>
> (3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

Obviously, it was not the intent of Congress to preclude all ad valorem taxes on air carriers' property. An ad valorem tax which meets certain balancing requirements in relation to other commercial and industrial property would be acceptable under (d)(1), as would an "in lieu tax" wholly utilized for airport and aeronautical purposes under (d)(3).

Inasmuch as the trial court found the tax to fall within the latter classification, we will review that first. The trial court relied on the history of central assessments of utilities and the provisions of SDCL 10-4-6.1, *supra,* referring to taxes or fees authorized to be levied or imposed in lieu of personal property tax to determine the tax was an "in lieu" tax. With that conclusion, we must disagree.

We first define the term "in lieu tax." It is not defined in the statute nor is it a term in common usage. "Lieu tax" means instead of, or, a substitute for, and it is not an additional tax. Black's Law Dictionary 832 (5th Ed. 1979), *citing* Lebeck v. State, 62 Ariz. 171, 156 P.2d 720 (1945). In *Lebeck,* the citizens of Arizona had adopted a constitutional amendment substituting a license tax (lieu tax) on motor vehicles for personal property ad valorem taxes on such vehicles.

In the case at bar, however, the tax is not a substitute for an ad valorem personal property tax. It is in fact the first

imposition of personal property tax on the airline flight property. It is an additional tax to the personal property taxes theretofore existing; nor does the reference in SDCL 10-4-6.1 to "in lieu" change that obvious fact.

"The name by which a tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents . . . ." Goodenough v. State, 328 Mich. 56, , 43 N.W.2d 235,239 (1950), *quoting* Dawson v. Kentucky Distilleries Co., 255 U.S. 288,292, 41 S.Ct. 272,274, 65 L.Ed. 638,645 (1921).

We therefore hold that the trial court erred in determining that the tax was an in lieu tax, but we further hold that the trial judge arrived at the right result of upholding the tax, but for the wrong reason. In our opinion, the tax is a valid imposition under the balancing test previously referred to under § 1513(d)(1).

Unlike the provision of (d)(3), the terminology of (d)(1) is clear and unambiguous. Subparagraph (A) essentially prohibits a discriminatory assessment ratio to true market value as between air carrier property and other commercial and industrial property. Subparagraph (C) essentially prohibits a discriminatory tax rate as between air carrier property and other commercial and industrial property.

Airlines cite us to Arizona Public Service Co. v. Sneed, 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979). Their reliance is misplaced. The factual situation is totally incomparable. Also, the federal statute, 15 U.S.C. § 391, which preempts the right of the state to tax electrical generation and transmission, is entirely different than the federal statutes under consideration herein. Likewise, Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983), is distinguishable as dealing with a gross receipts tax which is a form of "head tax" prohibited by 49 U.S.C. § 1513(a), an entirely different section than we are discussing here.

It is airlines' contention that the tax runs afoul of (d)(1) because the airlines, along with other centrally assessed businesses, are taxed on their personal property, whereas locally

assessed commercial and industrial businesses are not.[1] On its face, it appears to be a reasonable argument, but when one looks at the clear wording of the statute, it fails. Commercial and industrial property as used in (A) and (C) is defined to mean property, other than transportation property and land used for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy.* 49 U.S.C. § 1513(d)(2)(D). The locally assessed personal property, being exempt from property tax levy, cannot be included as commercial or industrial property for comparison under either (A) or (C).

The prohibition in (d)(1), with one exception, is almost verbatim to the prohibition found in federal legislation dealing with railroads and motor vehicles under the Revised Interstate Commerce Act of 1978 and the earlier Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 et. seq. (4-R Act). The 4-R Act was discussed in Atchison, Topeka & Santa Fe Ry. v. State of Ariz., 559 F.Supp. 1237 (D.Ariz. 1983). In that case, the Arizona Constitution exempted from taxation manufacturers' inventory, a form of personal commercial property. The plaintiffs were contending that this property should nevertheless be considered as commercial and industrial property "subject to a property tax levy" in the sense that it could be taxed if the people chose to amend the constitution. The court termed this interpretation unreasonable. It defined property subject to tax levy as property which is presently taxed. "Property which is for any reason tax-exempt is excluded as a form of commercial and industrial property." *Id.* at 1245.

The airlines cite us to the case of Otter Tail Power v. State, Civ. 82 3044 (D.S.D. Mar. 7, 1984), wherein the taxation of railroad cars was rejected by application of the 4-R Act. The trial court's opinion made no mention of the phrase "and subject to property tax levy." Rather, the decision followed an Eighth Circuit decision, Ogilvie v. State Bd. of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied* 454 U.S. 1086, 102 S.Ct.

[1] The airlines enjoy the same exemption on the balance of their personal property, which was locally assessed, as do the other commercial and industrial businesses.

644, 70 L.Ed.2d 621 (1981), a case involving taxation of personal property in North Dakota and likewise relied on heavily by airlines. We find the *Ogilvie* case strongly supportive of the tax rather than the preemption of it.

Ogilvie dealt with both real and personal property. The issue as to the real property centered around the assessment ratio to true value as between the centrally assessed railroad property and the locally assessed commercial and industrial property of other businesses. That is not relevant here. The second issue, however, is very much in point and in our opinion supports the imposition of the tax in this case.

Ogilvie was concerned with the preemption by the 4-R Act of North Dakota's imposition of taxes on railroad property. As we have noted before, the 4-R Act, with one exception, is almost verbatim with § 1513(d)(1). At this point, that exception looms large. Section 1513(d)(1) sets out three prohibitions comparable to the first three prohibitions in the Revised Interstate Commerce Act, 49 U.S.C. § 1503, and the 4-R Act, § 306. The latter two acts, however, also contain a fourth prohibition, "the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

It is noteworthy that the 4-R Act was enacted in 1976 and the Revised Interstate Commerce Act in 1978. In 1982, Congress, in enacting § 1513(d)(1), while following closely the first three sections of the earlier acts, omitted any reference to the fourth.

In *Ogilvie,* at the trial court level, 492 F.Supp. 446 (D.N.D. 1980), the trial judge first determined that the inclusion of personal property and trade fixtures in the assessed value of railroad property does not violate § 306(1)(a), (b), or (c) (the prohibitions similar to § 1513(d)(1)). With respect to (a), the prohibition of a higher assessment ratio, he determined that the inclusion of the locally assessed personal property would affect the total assessed value but not the assessment ratio.[2] Thus, of course, a levy and collection of a tax assessed under (a) would not violate (b). As to (c), the trial court

[2] This is an alternate theory to the one we adopt, but we nevertheless find it highly persuasive.

engaged in the same reasoning as the court did in *Atchison, Topeka & Santa Fe, supra,* holding that "the personal property of locally assessed businesses is not commercial and industrial property for purposes of § 30[6](1)(c) for § 306(3)(c) defines commercial and industrial property as property "which is subject to a property tax levy." 492 F.Supp. at 453. He held that locally assessed personal property is not commercial and industrial property because it is not subject to a property tax levy and, therefore, not comparable to transportation personal property to determine whether § 306(1)(c) has been violated.

The trial court then went on to find that the North Dakota tax scheme ran afoul of the fourth prohibition in § 306, the "any other tax" provision, which is not found in § 1513(d)(1). The court first reasoned that since the tax sought to be imposed did not fall under the preceding sections it was, therefore, encompassed within the term "any other tax." It went on to determine that it was discriminatory and concluded that it violated § 306(1)(d).

The Eighth Circuit stated in *Ogilvie* that "the district court properly interpreted both the language and intent of § 306." 657 F.2d at 210. The decision therefore supports the decision of Judge Jones in *Otter Tail Power, supra,* and the decision of this court in Montana-Dakota Util. v. S.D. Dept. of Rev., 337 N.W.2d 818 (S.D. 1983), both railroad cases, as well as the decision of this court to hold that § 1513(d)(1) does not preempt the airline flight property tax.

We affirm the judgment of the trial court.

FOSHEIM, *Chief Justice,* WOLLMAN, *Justice,* and WUEST, *Circuit Judge,* acting as a Supreme Court Justice, concur.

HENDERSON, *Justice,* concurs in part and dissents in part.

Although I agree with the majority's ruling on the in lieu arguments, I dissent on the imposition of the tax which is the crucial holding of the majority opinion.

Congress' intent in enacting 49 U.S.C. § 1513(d) was "to prohibit discriminatory property taxes imposed on air carriers." Aloha Airlines v. Director of Taxation, ____U.S.____, 104 S. Ct. 291,293, 78 L.Ed.2d 10, 13 n.3 (1983). *See also* the letter from the United States Senate Committee on Commerce,

Science, and Transportation, dated December 21, 1982, attached hereto and by this reference incorporated herein, which clearly reflects that the purpose of the act "is to prevent the continued discrimination of ad valorem taxation of airline flight property." That Congress has the authority to so control state taxation of air carriers in interstate commerce is beyond question. *See* Arizona Public Service Co. v. Snead, 441 U.S. 141,150, 99 S.Ct. 1629,1634, 60 L.Ed.2d 106,113 (1979). Congress' authority to so regulate is derived from the Commerce Clause of the United States Constitution and it is axiomatic that when a federal statute forbids state imposition of a tax, the state statute imposing the tax is preempted. *Aloha Airlines,* ____U.S. at ____, 104 S.Ct. at 294, 78 L.Ed.2d at 15.

The majority, however, determines that 49 U.S.C. § 1513(d) does not preempt the airline flight property tax imposed by SDCL ch. 10-29. The majority's rationale is that because locally assessed personal property is exempt from a property tax levy, it is not commercial or industrial property *subject to a property tax levy* under 49 U.S.C. § 1513(d)(2)(D), and thus, it cannot be used for discriminatory ratio or rate comparisons.

Such a construction of 49 U.S.C. § 1513(d) was recently rejected by the Supreme Court of North Dakota in Northwest Airlines v. State Bd. of Equalization, 358 N.W.2d 515 (N.D. 1984), and I accept the reasoning advanced therein over that of the present majority. Chief Justice Erickstad, in addressing an assertion by the State similar to the majority's rationale herein, wrote for a unanimous court that: "The construction urged by the State would allow discriminatory taxation of air carrier transportation property as long as a state imposed no tax at all on other commercial and industrial property. We cannot reasonably so construe the statute." *Id.,* 358 N.W.2d at 517. I, too, reject such a construction of 49 U.S.C. § 1513(d). The discrimination sought to be imposed against air carriers in this state is absolute.

Personal property taxes were repealed in 1978. *See* 1978 S.D. Sess. Laws chs. 72 and 73. The State, however, through SDCL ch. 10-29, still seeks to impose a personal property tax on airline flight property while all other commercial and industrial property is exempt from personal property taxes. By enacting

49 U.S.C. § 1513(d), the United States Congress sought and intended to eliminate burdens on interstate commerce by prohibiting discriminatory state taxes imposed on air carrier transportation property. To permit, as the majority's interpretation does, the taxation of airline personal property when all other commercial and industrial personal property is exempt from taxation, is to permit a "greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate. That is unreasonable." *Id.,* 358 N.W.2d at 517. Since the level of assessment on commercial and industrial personal property is zero, the level of assessment of the airlines' personal property must be reduced to zero. "A construction which accords with reason is to be preferred to a literal construction involving a palpable absurdity." Rice v. City of Watertown, 66 S.D. 221,223, 281 N.W. 116,117 (1938).

"[A]ssessing and taxing the Airlines' personal property while exempting other commercial and industrial personal property from taxation is prohibited by 49 U.S.C. § 1513(d)." 1513(d)." Airlines, 358 N.W.2d at 517. I would reverse the circuit court and rule that 49 U.S.C. § 1513(d) forbids the taxes imposed by SDCL ch. 10-29, and thus the latter is preempted by federal law.

United States Senate
Committee on Commerce,
Science, and Transportation
Washington, D.C. 20510

December 21, 1982

Mr. Paul R. Ignatius
President
Air Transport Association of America
1709 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Ignatius:

You have requested, on behalf of your airline members, clarifications of the legislative intent of Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (the "Act") concerning the assessment, levying or collecting of ad valorem flight property taxation of airline companies.

The purpose of the Act is to prevent the continued discrimination of ad valorem taxation of airline flight property. However, the Act must be interpreted in a manner that recognizes that all states do not have the same timetable for assessing and collecting such taxes. It was not intended to require a state to refund property taxes which have been levied and collected prior to the effective date of the Act, September 3, 1982.

The legislative intent is supported by Subparagraphs (B) and (C) of the Act which provide that relief from discriminatory assessments must be made when the taxes have not been actually levied and collected before the effective date of the Act. Furthermore, the purpose of Subparagraph (A) was to preclude discriminatory assessments, in the event they had not been made by September 3, 1982.

Unless a state has levied and collected discriminatory ad valorem flight property taxes on airline companies before September 3, 1982, that method of taxation should not be in effect during 1982.

Sincerely,

NORMAN Y. MINETA — BOB PACKWOOD

NANCY LANDON KASSEBAUM — HOWARD W. LAMDON

APPENDIX B

In Circuit Court
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES } ss:

WESTERN AIRLINES, INCORPORATED,
a Corporation,
Plaintiff,

v. MEMORANDUM DECISION

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al,*
Defendants.

FACTS

The above action comes before this Court by way of stipulation and order of consolidation. Five airlines, Western, Republic, Frontier, Ozark and Continental, (Plaintiffs) are involved in this litigation.

Four of the airlines involved, Republic, Western, Frontier, and Ozark, by way of notice of appeal and summons and complaint, seek an abatement and refund of taxes paid under protest for the year 1982. Counties involved in this series of suits are Brown, Beadle, Davison, Hughes, Pennington, Minnehaha, Codington and Yankton.

By stipulation of the parties, this Court also has before it appeals on the 1983 tax assessment by Republic Airlines against Minnehaha, Pennington, Brown, Codington and Yankton Counties; Western Airlines against Hughes, Minnehaha and Pennington Counties; Frontier Airlines against Pennington and Minnehaha Counties; Continental Airlines against Pennington County; and Ozark Airlines against Minnehaha County. These

four airlines are appealing the decision of the State Board of Equalization, which denied their petition to exempt its airline flight property from the 1983 tax.

Forty-two cases have been consolidated by stipulation and are jointly decided under the heading of Western Airlines v. Hughes County Board of Commissioners, et al.

Plaintiff airlines are all duly organized corporations authorized to transact business in South Dakota as air carriers. Each transacted business and maintained air carrier transportation property within South Dakota during 1982 and 1983.

In 1978 the South Dakota Legistlature repealed the personal property tax provisions. The Legislature took care to insure that the repeal of personal property taxes did not nullify the uniform taxation under which the utilities were already subjected. It adopted §10-4-6.1, which provides:

> Personal property as defined in § 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal and tax or fee authorized to be levied or imposed in lieu of personal property tax.

SDLC 10-29 provides for the taxation of airline flight property. Included within this section are procedural steps outlining the method of assessing the airline property.

Section 10-29-2 mandates that flight property of airline companies operating within South Dakota be assessed by the Department of Revenue (Department). Each airline is required to submit an annual report specifying the following:

> Name of company; nature of company; location of principal office; officers of company; annual financial statement; total tonnage of passengers, express and freight first received and finally discharged in the state; total hours flown by aircraft serving the state; total revenue ton miles in the state; total ton miles within and without the state; air flight property accounts by types of equipment; inventory of real and personal property by location, and original cost. § 10-29-3.

Section 10-29-8 provides that the Department shall annually assess all flight property of airline companies serving the state. Section 10-29-9 requires that the Secretary of Revenue determine the true and full value of that flight property actually providing service in this state.

Section 10-29-10 requires that the overall valuation of flight property be apportioned to the state and be determined on the basis of the use of the property in the state. The Legislature has established a formula for determining the valuation of airline property and properly appropriating it to this state.

The Department determines the proper allocation of airline property in South Dakota by basing the average of the total of the following three ratios for each type of aircraft;

> (1) That ratio which the total tonnage of passengers, express and freight first received by the airlines company in this state during the preceding calendar year plus the total tonnage of passenger, express and freight finally discharged by it within this state during the preceding calendar year bears to the total of such tonnage first received by the airline company or finally discharged by it, within and without this state during the preceding calendar year;
>
> (2) That ratio which the flight time of all aircraft of the airline company on flights serving this state during the preceding calendar year bears to the total of such time in flight within and without this state during the preceding calendar;
>
> (3) That ratio which the number of revenue ton miles of passengers, mail, express and freight flown by the airline company on flights serving this state during the preceding calendar year bears to the total number of such miles flown by

it within and without the state during the preceding calendar year.

Once an assessment is made through the factoring process of in-state operations, passengers, freight and time to the total operation of the company, a determination is made of the average mill rate in the state. This is accomplished by dividing the total taxable valuation of all property for the preceding year within this state into the total of all state and local taxes levied within the state on a millage basis for the present year. The Department then applies the mill rate on the value allocated to the airline company for business done in the state. Once a determination is made of the amount of taxes due, an allocation of proceeds collected is distributed to the various airports serving the airlines. § 10-29-15 mandates that receipt of these monies shall be allocated to the airports where such airline companies make regularly scheduled landings in the following manner:

(1) twenty-five (25) percent of the tax assessed to each airline company allocated equally to each airport in the state served by the airline company;

(2) seventy-five (75) percent of the total tax assessed to each airline company allocated on the basis which that ratio of total tonnage of passengers, mail, express, and freight first received and finally discharged at each airport during the preceding calendar year bears to the total tonnage of passengers, mail, express, and freight first received and finally discharged at all airports in the state served by the airline company during the preceding calendar year.

§ 10-29-15 further provides:

> . . . the taxes imposed by this chapter . . . shall be used exclusively by such airports for airport purposes as determined by the local governing body and approved by the department of transportation . . .

The Department assessed and collected (under protest) taxes from Plaintiffs pursuant to § 10-29 for 1982. The Department has also assessed taxes against plaintiffs for 1983. Plaintiffs appealed the 1983 tax assessment imposed and the State Board of Equalization denied the airlines' petition to exempt its airline flight property from the 1983 tax assessment.

Beginning in 1978, the U.S. Congress passed the first of several acts designed to combat tax discrimination with respect to businesses involved in interstate commerce. A portion of the Airport and Airway Improvement Act of 1982 addressed and prohibited the imposition of burdensome and discriminating acts against air carrier transportation property. This particular piece of legislation is codified at 49 USC § 1513(d) and provides:

> d. Burdensome and discriminatory acts.
>
> 1. The following acts unreasonably burden and discriminate against interstate commerce and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:
>
> A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or
>
> C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

2. . . .

3. This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

Plaintiffs argue that the provisions of § 10-29 impose an unreasonable burden upon them and that taxation pursuant to this section is discriminatory since commercial and industrial property in the state of South Dakota is exempt from the personal property tax, whereas all air carrier transportation property is subjected to taxation pursuant to § 10-29. Further, Plaintiffs argue that 49 USC 1513 preempts § 10-29. Plaintiffs maintain that enforcement of § 10-29 violates the federal statute as 49 USC 1513 is controlling and forbids this particular form of taxation. Lastly, Plaintiffs argue that the South Dakota Airline Flight Property Tax is not "in lieu" of another valid tax so as to fit under the exception carved out in § 1513(d)(3).

The Department argues that the tax imposed under the § 10-29 provision is an "in lieu" tax which is wholly utilized for airport and aeronautical purposes. The Department further argues that the South Dakota tax is not an unreasonable burden nor is it discriminatory against Plaintiffs. Therefore, the Department maintains that this tax is not preempted by federal law and may be imposed upon all airlines serving the state of South Dakota.

DECISION

In *Aloha Airlines, Inc. v. Director of Taxation*, 62 LW 4000, the United States Supreme Court acknowledged that by passage of the Airport and Airway Development Act of 1970, Pub. L. 91-258, 84 Stat. 219, Congress committed the federal government to assisting states and localities in expanding and improving the nation's air transportation system. Inevitably, problems with discriminatory taxation arose and by 1973 Congress saw the need to pass legislation prohibiting local taxes which burdened interstate air transportation. This was codified at 49 USC § 1513. However, in what appears to be an effort to revitalize the original intent of promoting the expansion and

improvement of our nation's airports, Congress amended § 1513 in 1982. The amendment prohibits discriminatory property taxes imposed on air carriers. It also declares that an "in lieu" tax which is wholly utilized for airport and aeronautical purposes is a permissible state tax.

South Dakota provides for the taxation of airline flight property under § 10-29. Plaintiffs maintain that this provision is in direct conflict with 49 USC § 1513 and therefore the state is preempted from imposing a tax upon the airlines.

Our Supreme Court has stated that when two statutes appear to be contradictory it is the court's duty to reconcile any such apparent contradiction and to give effect, if possible, to all of the provisions under consideration, construing them together to make them harmonious and workable. *In the Matter of Establishing Certain Territorial Electric Boundaries Within the State of South Dakota v. Northwestern Public Services Co.*, 281 NW2d 72 (S.D. 1979).

This Court is persuaded that § 10-29 is not in violation of § 1513. Construed together, § 10-29 and § 1513 are harmonious and workable.

It is clear that it was the intent of Congress to prohibit the imposition of state taxes which discriminate against airlines and impose unreasonable burdens on interstate commerce. It is also clear that Congress did not intend to disallow all state taxes imposed against airlines. It specifically included a provision which authorizes local taxation of airline property under certain conditions.

State taxes which are "in lieu" taxes and wholly utilized for airport and aeronautical purposes are permissable. If a state meets this two-prong test, the remaining subsection of § 1513(d) does not apply. The South Dakota provision meets the above criteria.

In 1978 South Dakota repealed the personal property tax provisions. The Legislature specifically provided for the continued taxation of certain personal property. § 10-4-6.1 provides:

> Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem

tax purposes and is exempt from ad valorem taxation. *This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.* (emphasis added)

Provision for the taxation of utilities is found in SDCL 10-28 through 10-37, with the exception of § 10-30, which was specifically repealed in 1980.

Airlines are assessed on a unit basis, as are other utilities in South Dakota. This method of assessment takes into account the whole operating unit nationwide and a portion of the entire unit is allocated to the state, based upon legislatively determined factors of use and presence in the state. Thus, it clearly is not an ad valorem tax.

As previously mentioned, the South Dakota Legislature provided for the taxation of utilities in SDCL 10-28 through 10-37, with the exception of 10-30, which was repealed. The enactment of these statutes, combined with the repeal of the personal property provisions and the "in lieu" provision contained within § 10-4-6.1, convinces this Court that § 10-29 is an "in lieu" tax, as are the other utility statutes. § 10-29 falls within the framework of § 10-4-6.1 and is an "in lieu" tax.

The second prong of § 15'3(d)(3) requires that any tax imposed upon airlines be wholly utilized for airport and aeronautical purposes.

§ 10-29-15 requires that monies collected pursuant to that chapter be used exclusively by the airports for aeronautical purposes. This is not a mere suggestion imparted by our Legislature, it is a directive. South Dakota statutes require that the funds be used in a manner which is consistent with and in accordance with the mandate of § 1513(d)(3).

In summary, this Court is convinced that § 10-29 is an "in lieu" tax. Monies raised from this tax are required to be returned to the airports to be used as deemed necessary by the local airport governing body.

Therefore, this Court holds that the tax provisions imposed upon the airlines serving South Dakota are permissible

pursuant to § 1513(d)(3). Consequently, this Court is not required to delve into the issue of whether this tax is burdensome or discriminatory, as the rest of § 1513(d) is not applicable. While the Court feels that § 10-29 is neither burdensome nor discriminatory, such a finding is not required to be made. § 10-29 meets the requirements of § 1513(d)(3). Therefore, this Court denies all of Plaintiffs' claims and holds that § 10-29 is an appropriate tax to be levied upon Plaintiffs.

Counsel for Department is directed to prepare findings of fact, conclusions of law and a judgment pursuant to the foregoing. The findings and conclusions shall specifically incorporate this opinion therein by reference.

Dated this 7th day of February, 1984.

By the Court:

/s/ ROBERT A. MILLER

ROBERT A. MILLER
Presiding Circuit Judge

ATTEST:

/s/ MARY I. ERICKSON
Clerk of Courts

By _____
Deputy

(SEAL)

APPENDIX C

Appeal No. 14560 — July 31, 1985

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA } ss:

Present: *Chief Justice* JON FOSHEIM and *Associate Justices* ROGER L. WOLLMAN, ROBERT E. MORGAN and FRANK E. HENDERSON and *Circuit Judge* GEORGE W. WUEST, acting as a Supreme Court Justice.

WESTERN AIR LINES, INCORPORATED,
a Corporation, *et al.*, *Plaintiffs and Appellants,*

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,
Defendants and Appellees.

This cause coming on to be heard on October 23, 1984, at a term of this Court at the Supreme Court Courtroom in the City of Spearfish, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Circuit Court, within and for Hughes County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that Appellee have and recover of the Appellants costs on this appeal, taxed and allowed at Fifty and No/100 Dollars.

(SEAL)

By the Court:

/s/ JON FASHEIM
Chief Justice

ATTEST:

/s/ GLORIA C. ENGEL
Clerk of the Supreme Court

By _____
Deputy

APPENDIX D

IN THE

Supreme Court of the State of South Dakota

WESTERN AIR LINES, INC.,
a corporation, *et al.*,
Plaintiffs and Appellants,

v.

HUGHES COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS, *et al.*,
Defendants and Appellees.

Filed Oct. 9, 1985
Gloria C. Engel
Clerk
CASE NO. 14560

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants Western Air Lines, Inc., Republic Airlines, Inc., Ozark Air Lines, Inc. and Frontier Airlines, Inc. hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Dakota, affirming the judgment of the Circuit Court, entered in this case on July 31, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

RITER, MAYER, HOFER & RITER

By /s/ ROBERT C. RITER, JR.

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57501-0280
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Of Counsel:

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888 Seventeenth Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

APPENDIX E-1
PARTIES BELOW

Plaintiff	Defendant	Circuit Court & Civil Case No.	
Western Airlines	Hughes County Treasurer	Sixth	83-157
	Hughes County Board of Commissioners	Sixth	83-222
	Pennington County Treasurer	Seventh	83-307
	Pennington County Board of Commissioners	Seventh	83-311
	Minnehana County Treasurer	Second	83-286
	Minnehaha County Board of Commissioners	Second	83-291
	State Board of Equalization	Seventh	83-343
	State Board of Equalization	Sixth	83-244
	State Board of Equalization	Second	83-320
Frontier Airlines	Pennington County Board of Commissioners	Seventh	83-310
	Pennington County Treasurer	Seventh	83-308
	Minnehaha County Board of Commissioners	Second	83-292
	Minnehaha County Treasurer	Second	83-287
	State Board of Equalization	Second	83-317
	State Board of Equalization	Seventh	83-341
Ozark Airlines	Minnehaha County Board of Commissioners	Second	83-290
	Minnehaha County Treasurer	Second	83-288
	State Board of Equalization	Second	83-318
Republic Airlines	Davison County Board of Commissioners	Fourth	83-284
	Davison County Treasurer	Fourth	83-283
	Hughes County Treasurer	Sixth	83-153
	Hughes County Board of Commissioners	Sixth	83-221

Plaintiff	Defendant	Circuit Court & Civil Case No.	
Republic Airlines	Codington County Board of Commissioners	Third	83-295
	Pennington County Board of Commissioners	Seventh	83-309
	Minnehaha County Board of Commissioners	Second	83-289
	Brown County Board of Commissioners	Fifth	83-278
	Yankton County Board of Commissioners	First	83-330
	Beadle County Board of Commissioners	Third	83-275
	Brookings County Board of Commissioners	Third	83-281
	Minnehaha County Treasurer	Second	83-285
	Brown County Treasurer	Fifth	83-277
	Yankton County Treasurer	First	83-329
	Beadle County Treasurer	Third	83-276
	Brookings County Treasurer	Third	83-282
	Pennington County Treasurer	Seventh	83-306
	Codington County Treasurer	Third	83-296
	State Board of Equalization	Second	83-319
	State Board of Equalization	Seventh	83-340
	State Board of Equalization	Fifth	83-326
	State Board of Equalization	Third	83-316
	State Board of Equalization	First	83-331
Continental Airlines	State Board of Equalization	Seventh	83-342

APPENDIX E-2

Airflight Property Taxes—1983

Airline	Value of Airflight property under S.D.C.L. 10-29-10	Assessed Value	Tax Assessed at average statewide mill rate (54.34)
Frontier	$1,579,442.00	740,758.00	$ 40,260.20
Republic	1,627,161.00	856,048.00	46,526.21
Western	2,762,008.00	1,432,772.00	77,871.16
Ozark	449,123.00	269,474.00	14,645.91
SUB TOTAL	$6,417,734.00	$3,299,052.00	$179,303.48
3 Others	501,819.00	278,771.00	15,151.20
TOTAL	$6,919,553.00	$3,577,823.00	$194,454.68

APPENDIX E-3

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "Assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

B. Pertinent portions of Title 10, South Dakota Codified Laws provide:

10-4-6.1 Exemption from taxation of personal property not centrally assessed—Taxes or fees in lieu unimpaired. Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.

10-6-33. Basis for determining valuation for tax purposes—Forced sale value not to be used. All property shall be assessed at its true and full value in money but not more than sixty percent of such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made and applied and the taxes computed. * * *

10-6-34.1 Centrally assessed property classified Percentage of value at which equalized. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and

personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized at the same percentage as other real property in the county.

10-29-2. Department of revenue to assess flight property. Flight property of airline companies operating in this state shall be assessed by the department of revenue and not otherwise.

10-29-8. Annual assessment of flight property Information considered—Addition of omitted property. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may add any property omitted from the return of such companies.

C. The Supremacy Clause of the United States Constitution (Art. VI, Clause 2) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC,; FRONTIER AIRLINES, INC,; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court
Of the State of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Attorney General
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Attorneys for Appellees

QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. §1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property of the same type." The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. §1513(d)(2)(D). Does this definition permit a state to escape §1513(d)'s prohibition by wholly exempting business personal property from taxation, while simultaneously imposing a tax on air carrier transportation property?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 85-732

IN THE

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BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court
Of the State of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraph 1(b) and 1(d) of the Revised Rules of this Court,

Appellees move that this appeal be dismissed or, alternatively that the Judgment of the Supreme Court of South Dakota dated July 31, 1985, holding that the Airport Development Acceleration Act of 1973, 49 USC 1513(d) does not preempt the South Dakota airline flight property tax, be affirmed.

STATEMENT OF THE CASE

In 1961 the South Dakota Legislature enacted an airline flight property tax, South Dakota Codified Laws 10-29. This tax is based upon the valuation of aircraft allocated on factors including passenger and freight tonnage; flight time of aircraft; and revenue ton miles, each factor being the relationship of the statistics of flights within the state compared to total flights of the airline company.

At the time the Act was enacted all property, real and personal, in the state of South Dakota, other than statutory or

constitutionally exempt property such as political subdivisions or religious or charitable institutions, were subject to tax. In 1978 the personal property tax in South Dakota was repealed and this included the tax on commercial and industrial or business related personal property. Centrally assessed property, however, continued to be subject to taxation. This included, among other things, railroads, telephone, utility, gas and water companies as well as airlines. (South Dakota Codified Laws 10-4-6.1 which reads as follows:)

> "Personal property as defined in §10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax."

Commencing in 1978 the Congress commenced to pass anti-tax discrimination

legislation with respect to several areas of interstate commerce.

The first of these concerned railroads. PL 95-473 enacted in 1978 declared certain practices to unreasonably burden and discriminate against interstate commerce and prohibited certain actions involving the assessment of rail transportation property, now codified as 49 U.S.C. 11503. The "4R" Act.

The second law, PL 96-296 enacted in 1980 proscribed tax discrimination against motor carrier transportation property, 49 U.S.C. 11503(a).

The third enacted in 1982 PL 97-238, a part of the Airport and Airway Improvement Act of 1982, codified as 49 U.S.C. 1513(d) prohibits burdensome and discriminatory acts against air carrier transportation property.

The Appellant Airlines raised proper challenges in the administrative boards and the Courts of South Dakota and at each level their appeal was denied and the tax upheld. The South Dakota Supreme Court in its decision of July 31, 1985, Western Air Lines, Inc., et al, v. State Board of Equalization, 372 N.W.2d 106 (1985) held that it was not the intent of Congress to preclude all advalorem taxes on air carriers property and said at page 109

> "An advalorem tax which meets certain balancing requirements in relation to other commercial and industrial property would be acceptable under (d)(1), as would an "in lieu tax" wholly utilized for airport and aeronautical purposes under (d)(3)."

Each of the Federal statutes prohibiting discrimination against interstate commerce property are identical to a point. They each prohibit and declare discriminatory and a burden on interstate commerce the assessment of the property of the entity (A)

at a value that has a higher ratio to the true market value of that property than of the assessed value of other commercial and industrial property of the same type; (B) the levying of a tax on an assessment that is related to property which has a higher ratio of market value than other commercial industrial property; or (C) the levying or collecting at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

The one clear cut distinction and difference between the railroad and motor carrier and air commerce tax statutes is that Congress in 49 U.S.C. 11503(b)(4) with respect to railroads added the further proviso that a state act would unreasonably burden and discriminate against interstate commerce if it "impose(d) another tax that discriminates against a rail carrier providing transportation subject to the

jurisdiction of the commission. . . ." This broad provision does not appear in the section on discrimination against motor carrier transportation property, 49 U.S.C. 11503(a), nor does it appear in the anti-discrimination statute with respect to air commerce property. 49 U.S.C. 1513.

REASONS TO AFFIRM THE SUPREME COURT OF SOUTH DAKOTA

In its decision, the Supreme Court of South Dakota correctly applied the law of the United States with respect to the subject in question in following the authority and reasoning of the Eighth Circuit Court of Appeals in the case of Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), cert denied, 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed. 2d, (1981). There is no question that the whole point of discrimination here is that the property of air carriers may not be taxed at a different ratio or a higher rate

than other commercial and industrial property. However the Congress has seen fit to define what constitutes commercial and industrial property in 49 U.S.C. 1513(d)(2)(D):

> "Property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; . . ." (Emphasis supplied for emphasis)

It is clear that the only property with which air commerce property is to be compared is property which is subject to a property tax levy. As already noted, personal property of other businesses except centrally assessed property in South Dakota is not subject to a property tax, therefore it is not commercial and industrial property under the Federal Act and therefore there is no basis to compare any assessment ratio or other measurement of value or tax with the tax imposed on airline flight property.

The District Court in the Ogilvie case, 492 F.Supp. 446, N.D.D.C. (1980) noted that since business property was not subject to a property levy, railroad personal property could not be compared to it in determining whether the railroad 4 R Act had been violated. However, as that Court pointed out, and as the Circuit Court of Appeals affirmed, not only were the 3 specified forms of discrimination prohibited but also "another tax that discriminates against a rail carrier. . ." Thus while there was no ratio or tax comparison which could be made, since commercial and industrial personal property was not being taxed there remained another tax which could and did discriminate, and thus the North Dakota tax scheme ran afoul of the fourth prohibition in Section 306. The same catchall clause is not contained in 49 U.S.C. 1513(d)(1). The Eighth Circuit Decision held

"The district court properly interpreted both the language and intent of §306." 657 F.2d at 221.

The Appellees believe if Congress so clearly was able to prohibit discriminatory taxes of railroads when compared to commercial and industrial property on which a tax was levied and likewise to prohibit any other discriminatory tax it was certainly capable of doing the same thing as far as air carriers were concerned. The absence of the 'any other tax concept' is clearly dispositive of this question. The South Dakota Court recognizing and applying the Ogilvie decision should be affirmed.

The Appellants have raised a spector that other more economically significant states may impose the same type of tax on airline property and on all other interstate carriers. This would be a

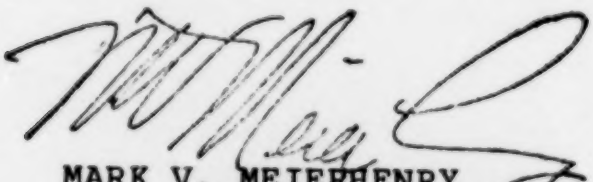
splendid argument if it were addressed to the Congress rather than to the Court since it was Congress which passed the anti-tax discrimination legislation and it is Congress which could make similar the restrictive provisions for air carriers as it saw fit to do for railroad property under the 4 R Act.

Appellants further argue that since the North Dakota Supreme Court decided an airline case exactly opposite to the South Dakota Court when the facts were basically the same this Court should reconcile the interpretations. Appellees submit that that is not the province of this Court so long as the South Dakota Supreme Court has properly applied the ruling of the Eighth Circuit Court of Appeals in the railroad case to a similar fact situation involving air carrier property.

CONCLUSION

For all these reasons this Court should dismiss the Appellants Appeal, or in the alternative affirm the Judgment of the South Dakota Supreme Court upholding the South Dakota airline flight property tax.

Respectfully submitted,



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No. 85-732

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BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court Of the State of South Dakota

---

REPLY BRIEF

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TABLE OF AUTHORITIES

Table of Authorities Continued

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OCTOBER TERM, 1985

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BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court Of the State of South Dakota

---

REPLY BRIEF

Appellees' motion to dismiss this appeal or, in the alternative, to affirm the judgment of the South Dakota Supreme Court gives this Court no reason to grant either form of relief. Instead, the motion starkly reveals the absence of any acceptable rationale for the Supreme Court of South Dakota to have denied interstate air carriers their federal protection from discriminatory state property taxes; and it reem-

phasizes the potential impact of this denial not only on airlines, but also on motor carriers and railroads.

First, appellees admit that South Dakota taxes the transportation property of interstate air carriers, even though most other commercial and industrial property is exempt from taxation. Motion 3,8.[1] Appellees also concede that "the Appellant Airlines raised proper challenges in the administrative boards and the Courts of South Dakota. . . ." *Id.* at 5.

Second, appellees do not dispute that §7(d) of the Airport Development Acceleration Act, 49 U.S.C. § 1513(d)("§ 1513"), was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 10 n. 13 (1983). Instead, appellees concede that § 1513(d) is one of three statutes, "identical to a point," "prohibiting discrimination against interstate commerce. . . ." Motion 4, 5. The legislative history of the other two statutes, applicable to railroads (49 U.S.C. § 11503) and motor carriers (49 U.S.C. § 11503a), shows that these statutes, like § 1513(d), were expressly "designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property. . .," including specifically "classifying carrier property in a separate class from all other taxable property."[2]

Third, appellees' principal argument appears to be that South Dakota's admittedly discriminatory airline

[1]"Motion ___," refers to appellees' Motion To Dismiss Or Affirm." "Juris. St. ___," refers to appellants' Jurisdictional Statement.

[2]S. Rep. No. 630, 91st Cong., 2d Sess. 2, 18 (1969).

flight property tax is permissible because § 1513, prohibiting discriminatory state taxation of interstate airlines, fails to contain the catchall language of the comparable statute for railroads, prohibiting "any other [state] tax which results in discriminatory treatment. . . ." 49 U.S.C. § 11503(b)(4). *See* Motion 6-7, 10-11. Appellees misunderstand that statute.

The catchall language of § 11503(b)(4) was not designed to prohibit some different kind of property tax discrimination; the drafters and supporters of the legislation believed that it already prohibited all forms of property tax discrimination even before the catchall provision was added to the bill. *See* Juris. St. 8-9 & nn. 9-11. The catchall provision instead was aimed at different taxes, such as a local gross receipts tax being imposed on the New York Dock Railway at a rate exceeding the rate applicable to other local public utilities.[3]

By contrast, § 1513(a) already prohibits any state tax whatsoever on an airline's gross receipts. *Aloha Airlines, supra*. The provisions of § 1513(d) therefore deal exclusively with state property taxes, and do not need a catchall provision like that of § 11503(b)(4) to prohibit a discriminatory gross receipts tax. The absence of such a catchall provision thus offers no rationale for interpreting § 1513(d) to permit discriminatory taxes on airline property.

Finally, appellees' reliance on *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D. N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 464

[3]*Railroads - 1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 94th Cong., 1st Sess. 1883 (1975) (Testimony of Stuart H. Johnson).

U.S. 1086 (1981) (*see* Motion 7-11), emphasizes that the federal courts, as well as state courts, have experienced difficulty in applying the language used in three important federal statutes prohibiting state or local discriminatory taxation of interstate transportation property—49 U.S.C. §§ 1513(d) (airlines), § 11503 (railroads), and 11503a (motor carriers). A definitive decision by this Court would resolve those difficulties.

As appellees note (Motion 9), the district court in *Ogilvie*—like the South Dakota Supreme Court—concluded that business property exempt from taxation was not "subject to a property tax levy," and thus was excluded from the definition, found in all three federal statutes, of "commercial and industrial property." *Ogilvie v. State Board of Equalization*, *supra*, 492 F. Supp. at 453. The district court thus concluded that only the catchall prohibition of § 11503(b)(4) prohibited North Dakota from taxing railroad property while simultaneously exempting most other business and industrial property from all taxation. *Id.* at 454.

The district court in *Ogilvie*, like the South Dakota Supreme Court, failed to recognize that Congress used the words "subject to a property tax levy" for a specific purpose: to permit traditional tax distinctions among real, tangible personal and intangible property, and traditional tax exemptions for charitable or religious property. *See* Jurs. St. 10 & n. 14. Thus, the district court's reasoning appears not to have been followed by the Eighth Circuit in affirming the *Ogilvie* decision,[4] and this reasoning was rejected by the

[4]The Eighth Circuit found that personal property of the railroads should be "exempt from taxation, the same as all other commercial and industrial property." 657 F.2d at 210. *But see Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983), in which the Eight Circuit described its *Oglivie* decision as resting on § 11503(b)(4). *See also Burlington North Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985).

North Dakota Supreme Court in a later case involving airlines, whose statute lacks the catchall prohibition. *Northwest Airlines, Inc. v. State Board of Equalization*, 358 N.W. 2d 515, 517 (N.D. 1984).

Other federal district courts also appear divided. One has followed the same reasoning as the *Ogilvie* district court to conclude that railroads cannot complain of discrimination if railroad personalty is taxed while inventories of other businesses are exempted from taxation.[5] But another has stated that "the ad valorem tax provisions of [§ 11503(a), (b) and (c)] make it plain that, for ad valorem tax purposes, the railroads are to be compared to *all other* commercial and industrial taxpayers. . . ." (emphasis added.)[6] And a third district court has applied § 11503a, which (like § 1513(d)) contains no catchall prohibition, to invalidate a Tennessee tax on motor carrier property because "other commercial and industrial property was presumed to have no value. . . ." *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982).

The present appeal focuses squarely and exclusively on the meaning of the phrase "subject to a property tax levy" as used in 49 U.S.C. §§ 1513(d), 11503, and 11503a. If this Court does not summarily reverse the

[5]*Atchison, Topeka & Sante Fe Railway Company v. State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983).

[6]*Kansas City Southern Railway Company v. McNamara*, No. 83-72-A slip op. at 7 (M.D. La. Dec. 19, 1985).

judgment of the South Dakota Supreme Court, then it should note probable jurisdiction to resolve the conflicting interpretations by both federal and state courts of this statutory language.

Respectfully submitted,

RAYMOND J. RASENBERGER*
RACHEL B. TRINDER
C. WESTBROOK MURPHY
ZUCKERT, SCOUTT, RASENBERGER
& JOHNSON
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3959
(202) 298-8660

Attorneys for Appellants
**Counsel of Record*

February, 1986

No. 85-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC. FRONTIER AIRLINES, INC.; and OZARK AIR LINES, INC.
Appellants,

vs.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court For the State of South Dakota

JOINT APPENDIX

RAYMOND J. RASENBERGER*
RACHEL B. TRINDER
C. WESTBROOK MURPHY
ZUCKERT, SCOUTT RASENBERGER & JOHNSON
888 - 17th Street, N.W.
Washington, D.C. 20006
Tel. No.: (202) 298-8660
Counsel for Appellants

MARK V. MEIERHENRY*
Attorney General
JOHN DEWELL
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
Tel. No.: (605) 773-3215
Counsel for Appellees

* *Counsel of Record*

Jurisdictional Statement Filed October 29, 1985
Probable Jurisdiction Noted February 24, 1985

TABLE OF CONTENTS

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* Refers to Jurisdictional Statement.

Table of Contents Continued

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* Refers to Jurisdictional Statement.

RELEVANT DOCKET ENTRIES

A. List of Cases Appealed

Date Filed	Defendant	Circuit Court & Civil Case No.
Cases filed by Western Airlines		
May 27, 1983	Hughes County Treasurer	Sixth Cir. 83-157
Aug. 5, 1983	Hughes County Board of Commissioners	Sixth Cir. 83-222
May 31, 1983	Pennington County Treasurer	Seventh Cir. 83-307
Aug. 15, 1983	Pennington County Board of Commissioners	Seventh Cir. 83-311
May 31, 1983	Minnehaha County Treasurer	Second Cir. 83-286
June 14, 1983	Minnehaha County Board of Commissioners	Second Cir. 83-291
Sept. 1, 1983	State Board of Equalization	Seventh Cir. 83-343
Sept. 1, 1983	State Board of Equalization	Sixth Cir. 83-244

Sept. 1, 1983	State Board of Equalization	Second Cir. 83-320

Cases Filed by Frontier Airlines

Aug. 15, 1983	Pennington County Board of Commissioners	Seventh Cir. 83-310
June 2, 1983	Pennington County Treasurer	Seventh Cir. 83-308
June 14, 1983	Minnehaha County Board of Commissioners	Second Cir. 83-292
June 3, 1983	Minnehaha County Treasurer	Second Cir. 83-287
Sept. 1, 1983	State Board of Equalization	Second Cir. 83-317
Sept. 1, 1983	State Board of Equalization	Seventh cir. 83-341

Cases Filed by Ozark Airlines

June 10, 1983	Minnehaha County Board of Commissioners	Second Cir. 83-290
June 10, 1983	Minnehaha County Treasurer	Second Cir. 83-288
Sept. 1, 1983	State Board of Equalization	Second Cir. 83-318

Cases Filed by Republic Airlines

May 26, 1983	Davison County Board of Commissioners	Fourth Cir. 83-284
May 24, 1983	Davison County Treasurer	Fourth Cir. 83-283

May 24, 1983	Hughes County Treasurer	Sixth Cir. 83-153
Aug. 5, 1983	Hughes County Board of Commissioners	Sixth Cir. 83-221
Sept. 9, 1983	Codington County Board of Commissioners	Third Cir. 83-295
Aug. 15, 1983	Pennington County Board of Commissioners	Seventh Cir. 83-309
June 8, 1983	Minnehaha County Board of Commissioners	Second Cir. 83-289
May 26, 1983	Brown County Board of Commissioners	Fifth Cir. 83-278
June 22, 1983	Yankton County Board of Commissioners	First Cir. 83-330
Sept. 16, 1983	Beadle County Board of Commissioners	Third Cir. 83-275
Aug. 9, 1983	Brookings County Board of Commissioners	third Cir. 83-281
May 24, 1983	Minnehaha County Treasurer	Second Cir. 83-285
May 24, 1983	Brown County Treasurer	Fifth Cir. 83-277
May 24, 1983	Yankton County Treasurer	First Cir. 83-329
May 24, 1983	Beadle County Treasurer	Third Cir. 83-276

May 24, 1983	Brookings County Treasurer	Third Cir. 83-282
May 24, 1983	Pennington County Treasurer	Third Cir. 83-306
May 24, 1983	Codington County Treasurer	Third Cir. 83-296
Sept. 1, 1983	State Board of Equalization	Second Cir. 83-319
Sept. 1, 1983	State Board of Equalization	Seventh Cir. 83-340
Sept. 1, 1983	State Board of Equalization	Fifth Cir. 83-326
Sept. 1, 1983	State Board of Equalization	Third Cir. 83-316
Sept. 2, 1983	State Board of Equalization	First Cir. 83-331

Cases Filed by Continental Airlines

Sept. 1, 1983	State Board of Equalization	Seventh Cir. 83-342

Docket Entries

Western Airlines v. Hughes County Treasurer, Sixth Judicial Circuit No. 83-157:

May 27, 1983 Complaint
June 27, 1983 Answer

Western Airlines v. Hughes County Board of Commissioners, Sixth Judicial Circuit No. 83-22:

Aug. 4, 1983 Complaint
Notice of Appeal

In the Matter of The Appeal of Western Airlines, Inc., From the Decision of the State Board of Equalization, Seventh Judicial Circuit No. 83-343:

Aug. 31, 1983 Notice of Appeal
Nov. 10, 1983 Certification of Record

Consolidated Cases:

Nov. 18, 1983 Stipulation
Nov. 23, 1983 Order
Feb. 7, 1984 Memorandum Decision
Feb. 23, 1984 Judgment
March 9, 1984 Notice of Entry of Judgment
April 9, 1984 Stipulation and Order
April 9, 1984 Notice of Appeal
Dec. 21, 1982 Opinion on Appeal
July 31, 1985 Judgment
Oct. 9, 1985 Notice of Appeal

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

WESTERN AIR LINES, INC., a corporation,
Plaintiff,

vs.

HUGHES COUNTY, SOUTH DAKOTA and RICHARD BUD RAY,
as Treasurer of Hughes County,
Defendants.

COMPLAINT

COMES NOW, the above entitled Plaintiff and for its cause of action against the Defendants, states and alleges as follows:

I.

That Western Air Lines, Inc. is a duly organized corporation authorized to do business in the State of South Dakota as an air carrier.

II.

That Hughes County is a duly organized County, organized under the laws of the State of South Dakota.

III.

The Richard Bud Ray is the duly elected and acting Treasurer of Hughes County and is the party who collected the taxes hereinafter referred to.

IV.

That said Plaintiff air carrier, transacted business in South Dakota during 1982 and maintained air carrier transportation property within South Dakota during said year.

V.

That Hughes County levied and collected airline flight property taxes from the Plaintiff for the year 1982, and the Plaintiff paid the first half of said tax in the amount of $ 2,885.57, which payment was sent by the Plaintiff on April 29, 1983 and received by the Defendants on May 5, 1983.

VI.

That at the time of the payment of said tax, the Plaintiff paid the same under protest as permitted by SDCL 10-27-2. The protest notice sets forth generally the bases of protest as hereinafter referred to.

VII.

Under the provisions of SDCL Chapter 10-4, commercial and industrial personal property is exempt from ad valorem taxation, effectively reducing the property tax rate on such property to zero.

VIII.

Section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, places restrictions upon the various states' and local governments' assessment, levy and collection of taxes on air carrier transportation property, effective September 3, 1982. The

federal statute preempts and is controlling over any state statutes purporting to authorize such taxation.

IX.

That the federal statutes above mentioned prohibit a State, or a sub-division of a State, from assessing air carrier transportation property at a higher ratio than other commercial and industrial property, levying or collecting a tax on such prohibited assessment, and levying or collecting a tax on air carrier transportation property at a tax rate exceeding that applied to other commercial and industrial property.

X.

That by assessing, levying and collecting the tax paid under protest by the Plaintiff, this Defendant County and its Treasurer named above, attempted to levy and collect tax upon the Plaintiff's air carrier transportation property, and to treat the same differently than similar property which is otherwise exempt from taxation pursuant to South Dakota statute, thereby violating the federal statutes above referred to, and discriminating against the Plaintiff.

XI.

The Plaintiff's property taxed hereunder is used in interstate commerce; therefore, the Defendant's assessment, levy and collection of taxes upon the same is violative of the Constitutions of the United States and the State of South Dakota.

XII.

By federal law the State and County are specifically prohibited from the taxation imposed against and collected from the Plaintiff herein and paid under protest; thus the imposition and collection of the tax by the Defendants is

null and void and the monies paid by the Plaintiff should be reimbursed to it.

WHEREFORE, the Plaintiff prays that this Court grant Plaintiff a Judgment ordering Defendants to reimburse the tax monies paid by the Plaintiff and more specifically set forth above; and by its Judgment forbid further assessments and collection efforts against this Plaintiff by said County and its Treasurer; and declare the Defendants' attempt to tax and recover these sums from Plaintiff null and void; and for such other and further relief as to this Court may seem just and proper.

DATED this 27th day of May, 1983.

RITER, MAYER, HOFER & RITER

By: /s/Robert C. Riter, Jr.
ROBERT C. RITER

and: /s/R. C. Riter
Members of said firm
319 S. Coteau - P.O. Box 280
Pierre, SD 57501-0280
Attorneys for Plaintiff

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

CIV. NO. _____

WESTERN AIRLINES, INC. a corporation,
Plaintiff,

vs.

HUGHES COUNTY, SOUTH DAKOTA and RICHARD "BUD" RAY as County Treasurer,
Defendants.

DEFENDANTS' ANSWER

Comes now the Hughes County States Attorney and the Attorney General of South Dakota on behalf of the Defendants herein and for answer to the Complaint of the Plaintiff states and alleges as follows:

I

Denies all allegations of Plaintiff's Complaint except those specifically admitted herein.

II

Admits paragraphs I, II, III, IV, V, VI, VIII of Plaintiff's Complaint.

III

As to paragraph VII of Plaintiff's Complaint, Defendants admit that certain commercial and industrial personal property is exempt under the provisions of SDCL 10-4; however, Defendants deny that the exemption extends to that personal property which is "centrally assessed".

IV

As to paragraph IX of Plaintiff's Complaint, Defendants admit that 49 USC 1513 as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 restricts the ability of a state to unreasonably burden and discriminate against interstate commerce but denies that the state which makes the assessment of airline flight property and the Defendants which collect the tax do any of those things.

V

Defendants deny specifically paragraphs X, XI and XII of the Plaintiff's Complaint and allege that the tax in issue is a tax based on the use of Plaintiff's property in this state and such tax when collected is utilized wholly for airport and aeronautical purposes and is in lieu of property taxes and is therefore permitted by 49 USC 1513(d)(3).

WHEREFORE, Defendants pray that the Court determine the tax in issue is an in lieu of tax and is specifically permitted under federal and state law and therefore dismiss the Complaint of the Plaintiff.

STEVEN ZINTER
Hughes County States Attorney

/s/John Dewell
JOHN DEWELL
Assistant Attorney General
Attorneys for Defendants
700 N. Illinois
Pierre, SD 57501

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

WESTERN AIR LINES, INC., a corporation,
Plaintiff,

vs.

HUGHES COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, D.J. HULL, WARREN HUNSLEY, QUENTIN YOUNGBERG, RICHARD CARTER and KEITH GARBER,
Defendants.

COMPLAINT

COMES NOW, the above entitled Plaintiff and for its cause of action against the Defendants, states and alleges as follows:

I.

That Western Air Lines, Inc. is a duly organized corporation authorized to transact business in the State of South Dakota as an air carrier.

II.

That Hughes County is a duly organized County organized under the laws of the State of South Dakota.

III.

That D. J. Hull, Warren Hunsley, Quentin Youngberg, Richard Carter and Keith Garber, are the duly elected and acting Board of Commissioners for Hughes County, South Dakota.

IV.

That said Plaintiff air carrier transacted business in South Dakota during 1982 and maintained air carrier transportation property within South Dakota during said year.

V.

That Hughes County levied and collected airline flight property taxes from the Plaintiff for the year 1982, and the Plaintiff paid the first half of said tax in the amount of $3,995.57 on May 5, 1983.

VI.

That at the time of the payment of said tax the Plaintiff paid the same under protest as permitted by SDCL 10-27-2. Further, the Plaintiff thereafter and on or about April 26, 1983 by letter to the Board of County Commissioners applied for abatement or refund of property in accordance with SDCL 10-18.

VII.

A copy of the application, which describes the tax and property involved and the grounds for abatement or refund, is attached hereto as Exhibit A and incorporated herein by reference.

VIII.

The Board of County Commissioners of Hughes County, on or about July 18, 1983 entered a decision denying the request for abatement. A copy of such decision is labeled Exhibit B and attached hereto and incorporated herein by reference.

IX.

That the property sought to be taxed by the above named County is exempt from tax as more specifically described hereafter.

X.

Under the provisions of SDCL Chapter 10-4, commercial and industrial personal property is exempt from ad valorem taxation, effectively reducing the property tax rate on such property to zero.

XI.

Section 1113 of the Federal Aviation Act of 1958 (49 U.S.C. 1513) as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, places restrictions upon the various states' and local governments' assessment, levy and collection of taxes on air carrier transportation property, effective September 3, 1982. The federal statute preempts and is controlling over any state statutes purporting to authorize such taxation.

XII.

That the federal statutes above mentioned prohibit a State, or a sub-division of a State, from assessing air carrier transportation property at a higher ratio than other commercial transportation property, levying or collecting a tax on such prohibited assessment, and levying or collecting a tax on air carrier transportation property at a tax rate exceeding that applied to other commercial and industrial property.

XIII.

That by assessing, levying and collecting the tax paid under protest by the Plaintiff, this Defendant County lev-

ied and collected taxes upon the Plaintiff's air carrier transportation property, and treated the same differently than similar property which is otherwise exempt from taxation pursuant to South Dakota statute, thereby violating the federal statutes above referred to, and discriminating against the Plaintiff.

XIV.

The Plaintiff's property taxed hereunder is used in interstate commerce; therefore, the Defendants' assessment, levy and collection of taxes upon the same is violative of the Constitutions of the United States and the State of South Dakota.

XV.

By federal law the State and County are specifically prohibited from the taxation imposed against and collected from the Plaintiff herein and paid under protest; thus the imposition and collection of the tax by the Defendants is invalid and the monies paid by the Plaintiff should be reimbursed to it.

WHEREOF, the Plaintiff prays that this Court order that the Auditor of the above named County issue and deliver to Plaintiff a refund of the tax monies paid by the Plaintiff and more specifically set forth above, further, that by its judgment the Court forbid further assessments and collection efforts against this Plaintiff by said County, and declare the Defendants' attempt to tax and collect these sums from Plaintiff invalid and thus null and void; and for such other and further relief as to this County may seem just and proper.

DATED this 4th day of August, 1983.

RITER, MAYER, HOFER & RITER

By:/s/_____

and:/s/ROBERT RITER, JR.
Members of said firm
319 S. Coteau—P.O. box 280
Pierre, SD 57501-0280
Attorneys for Plaintiff

EXHIBIT A

Western Airlines

April 26, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Board of County Commissioners
c/o County Auditor
Hughes County
Pierre, SD 57501

Gentlemen:

This letter will constitute an Application for Abatement/Refund of Property Tax in accordance with SDCL, Chapter 10-18.

In submitting this Application, we are respectfully requesting abatement/refund of property tax in the amount of $7,771.14. Such property tax was levied on the Company's aircraft for the year 1982.

Section 1113(d) of the Federal Aviation Act of 1958, as amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (copy attached), places restrictions on the assessment and taxation of air carrier transportation property effective September 3, 1982. The legislation prohibits a State or subdivision of a State from 1) assessing air carrier transportation property at a higher ratio than other commercial and industrial property, 2)

levying or collecting a tax on such prohibited assessment, and 3) levying or collecting a tax on air carrier transportation property at a tax rate which exceeds that applied to other commercial and industrial property.

Under the provisions of SDCL, Chapter 10-4, commercial and industrial personal property is exempt from and valorem taxation, effectively reducing the property tax rate to zero on such property. In compliance with the Federal legislation described above, the tax rate on air carrier transportation property must also be reduced to zero effective September 3, 1982. As explained in the attached letter from the United States Senate dated December 2, 1982, the provisions of the Federal legislation are applicable to taxes levied or collected after September 2, 1982.

Board of County Commissioners
April 26, 1983
Page Two

Your favorable consideration of our request for abatement/ refund of 1982 property tax would e sincerely appreciated.

Very truly yours,

WESTERN AIR LINES, INC.

/s/G. L. STEWART
G. L. Stewart
Vice President
and Controller

DLH:jk

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

G. L. Stewart, being first duly sworn upon oath, deposes and states that he is the Vice President and Controller of Western Air Lines, Inc., and as such is duly authorized to execute this document, that this document has been examined by him, and that the statements of fact made above, to the best of his knowledge and belief, are true, correct and complete.

UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
WASHINGTON, D.C. 20510

December 21, 1982

Mr. Paul R. Ignatius
President
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Ignatius:

You have requested, on behalf of your airline members, clarification of the legislative intent of Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (the "Act") concerning the assessment, levying or collecting of ad valorem flight property taxation of airline companies.

The purpose of the Act is to prevent the continued discrimination of ad valorem taxation of airline flight property. However, the Act must be interpreted in a manner that recognizes that all states do not have the same timetable for assessing and collecting such taxes. It was not intended to require a state to refund property taxes which have been levied and collected prior to the effective date of the Act, September 3, 1982.

The legislative intent is supported by Subparagraphs (B) and (C) of the Act which provide that relief from discriminatory assessments must be made when the taxes have not been actually levied and collected before the effective date of the Act. Furthermore, the purpose of Subparagraph (A) was to preclude discriminatory assessments, in the event they had not been made by September 3, 1982.

Unless a state has levied and collected discriminatory ad valorem flight property taxes on airline companies before September 3, 1982, that method of taxation should not be in effect during 1982.

Sincerely,

/s/NORMAN Y. MINETA
NORMAN Y. MINETA

/s/BOB PACKWOOD
BOB PACKWOOD

/s/NANCY LANDON KASSEBAUM
NANCY LANDON KASSEBAUM

/s/HOWARD W. CANNON
HOWARD W. CANNON

EXHIBIT B

OFFICE OF
THE COUNTY AUDITOR
HUGHES COUNTY
PIERRE, SOUTH DAKOTA

July 18, 1983

Mr. G.L. Stewart
Vice President and Controller
Western Airlines, Inc.
P.O. Box 92005
World Way Postal Center
Los Angeles, CA 90009

Re: Rejection of Application for Abatement/Refund of Property Tax dated April 26, 1983

Dear Mr. Stewart:

Please be advised that your application for abatement/refund of property tax has been denied by majority vote of the Hughes County Commission, as said property is not exempt from taxation under law.

Yours very truly,

/s/D Hull
Chairman
Hughes County Commission

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

WESTERN AIR LINES, INC., a corporation,
Plaintiff,

vs.

HUGHES COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, D.J. HULL, WARREN HUNSLEY, QUENTIN YOUNGBERG, RICHARD CARTER and KEITH GARBER,
Defendants.

NOTICE OF APPEAL

COMES NOW, Western Air Lines, Inc., by and through its attorneys, RITER, MAYER, HOFER & RITER of Pierre, South Dakota, and hereby gives Notice of its Appeal from the decision of the Board of County Commissioners denying its request for abatement and refund of airline flight property taxes paid on May 5, 1983. That the bases for such appeal are as specified in the Summons and Complaint attached hereto and served and filed contemporaneously herewith.

DATED this 4th day of August, 1983.

RITER, MAYER, HOFER & RITER

By: /s/Rich Riter
RICH RITER

and: /s/Robert C. Riter, Jr.
Members of said firm
319 S. Coteau - P.O. Box 280
Pierre, SD 57501-0280
Attorneys for Plaintiff

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN THE MATTER OF THE APPEAL OF WESTERN AIR LINES, INC. FROM THE DECISION OF THE STATE BOARD OF EQUALIZATION.

CERTIFICATION OF RECORD

Comes now R. Van Johnson, duly appointed, qualified and acting Secretary of Revenue of the State of South Dakota and as such, Secretary Ex-Officio Secretary of the State Board of Equalization, and certifies the wwithin record to the Court pursuant to SDCL 10-11-43. The above airline appealed to the State Board of Equalization from the decision of the Department of Revenue respecting its property and the assessment thereof in this state, Attachment 1. The State Board of Equalization held a hearing on the appeal of the Appellants herein as further evidenced by the Minutes of the State Board of Equalization, included here as Attachment 2. Following such hearing on August 17, 1983, the State Board of Equalization entered Findings of Fact, Conclusions of Law and ordered that the appeal be denied and the valuation set by the Department of Revenue be sustained, Attachment 3. The Minutes of the State Board of Equalization were filed on September 8, 1983. Notice of Appeal was given by the Appellants herein from the decision of the State Board of Equalization on September 1, 1983, Attachment 4. All documents herein certified to the Court are the originals presented to the State Board of Equalization or true and correct copies of the same.

Dated this ___day of November, 1983.

/s/R. Van Johnson
R. VAN JOHNSON
Secretary of Revenue
Ex-Officio Secretary of the
Board of Equalization

July 18, 1983

Mr. R. Van Johnson
Secretary
Department of Revenue
State Board of Equalization
Kneip Building
700 N. Illinois
Pierre, SD 57501

Re: Western Air Lines, Inc.

Dear Mr. Johnson:

We write to you on behalf of our client, Western Air Lines, Inc.

Our client has received your letter of July 5, 1983 assessing the true and full value of the property of that company for 1983 in the sum of $2,762,008.00. Our client is aggrieved by the action of the State Department of Revenue as to the Department's determination of value and and assessment of value so as to impose airline flight property tax upon our client. Hence, we write this letter to you and appeal to the State Board of Equalization for a determination of our grievance.

We appeal from the determination of taxable value and the assessment placed thereupon, inasmuch as Section 1113 of the Federal Aviation Action of 1958 (U.S.C. 1513) as amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, specifically restricts the State of South Dakota and the various local governments from assessing, levying and collecting the tax sought to be imposed. As we have previously advised you, federal statutes prohibit the assessment of air carrier transportation property at a higher ratio than other commercial transportation property. Inasmuch as the State of South Dakota has exempted commercial and industrial personal

property from ad valorem taxation, effectively reducing the property tax rate on such property to zero, if the Department of Revenue is able to assess our client's property and impose a tax thereupon, such tax would be of a rate greater than that of similar property within the State and would discriminate against our client and other airlines. As such, we submit that your assessment and attempt to impose, levy and collect these taxes is violative of the Constitutions of the United States and the State of South Dakota and is preempted specifically by the federal statutes mentioned above. As such, the assessment and imposition is invalid, null and void.

We would ask that the Board of Equalization consider this appeal and set an appropriate date for hearing the question.

Thank you very much for your consideration.

Very truly yours,

RITER, MAYER, HOFER & RITER
By: Rick Riter, Jr.
RICK RITER JR.

RCR Jr-wo

cc: Mary L. Sullivan

AIRLINES APPEAL
Appeals #68-#72

Appearing for Appellants:	Robert C. Riter, Jr., Attorney	
Appearing for State:	Dennis Hanson, Utilities evaluator Department of Revenue	
Date of Hearing:	July 21, 1983	All Duly Sworn

Appeal to the State Board of Equalization from the assessment of (#68) Frontier Airlines, Inc., (#69) Continental Airlines Corporation, (#70) Republic Airlines, Inc., (#71) Ozark Air Lines, Inc., and (#72) Western Air Lines, Inc. as placed thereon by the Department of Revenue

Dennis Hanson of the Department of Revenue discussed assessment procedures. He stated that these are unit type assessments on which tax is computed by applying levy. The property consists of the aircraft themselves, and the taxes collected are turned over to local airports for maintenance, etc. An allocation formula is used in distributing the funds.

Robert Riter, Jr., Attorney for the Appellants, stated that the appeal is the result of an amendment (Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982) to Section 1113 of the Federal Aviation Act of 1958, which restricts the State of South Dakota and its local governments from assessing, levying and collecting taxes sought to be imposed. Noted in Mr. Riter's letter of July 19, 1983 was previous advisement to the State Board that "federal statutes prohibit the assessment of air carrier transportation property at a higher ratio than other commercial transportation property". In assessing Appellants' properties, taxes would be greater than those on other commercial property and would therefore be discriminatory and invalid.

John Dewell, Attorney for the Department of Revenue, advised that this tax is an "in lieu of" tax and therefore the statutes referred to above are inapplicable.

IT WAS MOVED by Arthur Anderson, seconded by Arnold Janssen to deny the appeals. Roll call vote: all ayes, MOTION CARRIED.

August 16, 1983
Western Airlines, Inc.
c/o Riter, Mayer, Hofer & Riter
Professional & Executive Bldg.
PO Box 280
Pierre, SD 57501-0280

RE: Appeal to the State Board of Equalization form the action of the South Dakota Department of Revenue on the assessment of Western Airlines Inc. operating property in the State of South Dakota.

Notice of Appeal having been given by Appellant, Western Airlines, Inc. from the action of the Department of Revenue relative to the assessment of certain property described in such appeal and the State Board of Equalization having considered the matter and all evidence presented and being fully advised in the premises now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

That the appellant's contention is that the property in question is exempt from taxation under the 1982 Tax Equity and Fiscal Responsibility Act which amended Section 1113 of the Federal Aviation Act of 1958 (49 USC1513).

That flight property in South Dakota is assessed on a use basis pursuant to SDCL 10-29.

That the apportionment to the State of the value of the airline flight property is done on a basis of the use of such property in this state based on the ratio of total tonage of passengers, express and freight for the calendar year first received in this state plus the same elements discharged in this state compared to the total of such tonage received or discharged without the state during the preceeding calendar year; the ratio of flight time of all aircraft serving the state to the flight time of aircraft within and without the state during the preceeding calendar year; the ratio of the number of revenue ton miles

of passenger mail express and freight flown by the airline company on flights serving the state to the total number of such miles flown within and without the state during the preceeding calendar year.

That the tax imposed pursuant to 10-29 is allocated to airports in the state, 25% on an equal basis and 75% on the basis of the ratio of the total tonage of passenger mail, express and freight received and discharged at each airport in this tate to the total tonage of the same at all airports in this state and that such proceeds are pursuant to SDCL 10-29-15 used exclusively by airports for airport purposes as determined by the local governing body and approved by the Department of Transportation.

That after equalization an average mill rate is computed by dividing the total taxable valuation of all property for the preceeding year within the state into the total of all state and local taxes levied within the state on a millage basis for the present year and the same is then applied to the valuation based on the use of the aircraft in this state.

CONCLUSIONS OF LAW

That there is no unreasonable burden and discrimination against interstate commerce.

That the airline flight property tax is in lieu of personal property tax and is totally utilized for airport and aeronautical purposes, therefore, in conformity with Section (d)(3), this tax is lawful and not a violation of Federal law.

Therefore it is

ORDERED that the appeal be denied and the valuation set by the Department of Revenue be sustained.

/s/R. Van Johnson
R. VAN JOHNSON
Secretary of Revenue

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN THE MATTER OF THE APPEAL OF WESTERN AIR LINES, INC. FROM THE DECISION OF THE STATE BOARD OF EQUALIZATION.

NOTICE OF APPEAL

COMES NOW, Western Air Lines, Inc., by and through its attorneys, RITER, MAYER, HOFER & RITER of Pierre, South Dakota, and hereby gives Notice of its Appeal from the Findings of Fact, Conclusions of Law and Decision of the State Board of Equalization dated August 16, 1983 denying said airlines' petition to exempt its airline flight property from taxation. The bases for the appeal are as shown on Exhibit A, attached hereto and incorporated herein by reference.

DATED this 31st day of August, 1983.

RITER, MAYER, HOFER & RITER

By: /s/Robert Riter, Jr.
ROBERT RITER, JR.

and: /s/R.C. Riter
Members of said firm
319 S. Coteau - P.O. Box 280
Pierre, SD 57501-0280
Attorneys for Western Air Lines, Inc.

EXHIBIT A

We appeal from the determination of taxable value and the assessment placed thereupon, inasmuch as Section 1113 of the Federal Aviation Action of 1958 (U.S.C. 1513) as amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, specifically restricts the State of South Dakota and the various local governments from assessing, levying and collecting the tax sought to be imposed. Federal statutes prohibit the assessment of air carrier transportation property at a higher ratio than other commercial transportation property. Inasmuch as the State of South Dakota has exempted commercial and industrial personal property from ad valorem taxation, effectively reducing the property tax rate on such property to zero, if the Department of Revenue is able to assess our client's property and impose a tax thereupon, such tax would be of a rate greater than that of similar property within the State and would discriminate against our client and other airlines. As such, we submit that the assessment and attempt to impose, levy and collect these taxes is violative of the Constitutions of the United States and the State of South Dakota, is discriminatory, and is preempted specifically by the federal statutes mentioned above. As such, the assessment and imposition is invalid, null and void.

We also object to the Findings of Facts and Conclusions of Law of the State Board of Equalization as being wholly in error.

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

WESTERN AIR LINES, INC., a corporation, *et al.*
Plaintiffs,

vs.

HUGHES COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, D. J. HULL, WARREN HUNSLEY, QUENTIN YOUNGBERG, RICHARD CARTER and KEITH GARBER, *et al.*,
Defendants.

STIPULATION

It is hereby stipulated by and between Western Air Lines, Inc., Republic Airlines, Inc. and Frontier Airlines, Inc., by and through their attorneys, RITER, MAYER, HOFER & RITER of Pierre, South Dakota, and the following Defendant Counties and their Boards of Commissioners named by Western Air Lines, Inc., being Hughes County, Pennington County and Minnehaha County, and the following Defendant Counties and their Boards of Commissioners named by Republic Airlines, Inc., being Brown County, Brookings County, Beadle County, Davison County, Hughes County, Pennington County, Minnehaha County, Codington County and Yankton County and the following Defendant Counties and their Boards of Commissioners named by Frontier Airlines, Inc., being Minnehaha County and Pennington County, by and through the attorney appearing for those Defendants in this action, Assistant Attorney General John Dewell, as follows:

WHEREAS, the Plaintiffs have previously requested abatement and refund of airline flight property taxes due and owing during 1983, and

WHEREAS, the respective Counties and their Boards of Commissioners have previously denied in full the airlines requests for abatement and refund of the taxes due in 1983, and

WHEREAS, the above entitled airlines have now paid the second half payment due on November 1, 1983, that it is hereby

STIPULATED AND AGREED by and between the parties hereto that the Notice of Appeal filed herein shall be and is hereby amended to show that the November 1, 1983 payment has been made; and it is further

STIPULATED AND AGREED that this litigation shall be an appeal from the respective Commissions' previous denials to abate the respective airlines' tax, and further from the denials of the Commissioners to refund those monies paid on or about May 1, 1983, as well as those paid on or about November 1, 1983; and it is further

STIPULATED AND AGREED that the prior decision entered by each Board of Commissioners to deny the abatement and refund may apply to the payments due November 1, 1983; and it is further

STIPULATED AND AGREED that the Plaintiffs may proceed herein as if all statutory requirements had been complied with on the appeal from the denials of the abatement and refund as regards the payments due on November 1, 1983; and it is further

STIPULATED AND AGREED that the pleadings herein may be amended so as to include not only the payments due on November 1, 1983, but all future payments hereinafter made by the Plaintiffs, until this litigation is finally resolved.

DATED this 18th day of November, 1983.

RITER, MAYER, HOFER & RITER

By: /s/Robert C. Riter, Jr.
ROBERT C. RITER, JR.

and: /s/R.C. Riter
Attorneys for the Plaintiffs

/s/John Riter
Attorney for the Defendants

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

ORDER

Upon the reading and filing of the Stipulation of the parties, Western Air Lines, Inc., Republic Airlines, Inc., and Frontier Airlines, Inc., by and through their attorneys, RITER, MAYER, HOFER & RITER of Pierre, South Dakota, and the following Defendant Counties and their Treasurers named by Western Air Lines, Inc., being Hughes County, Pennington County and Minnehaha County, and the following Defendant Counties and their Treasurers named by Republic Airlines, Inc., being Brown County, Brookings County, Seadle County, Davison County, Hughes County. Pennington County, Minnehaha County, Codington County and Yankton County and the following Defendant Counties and their Treasurers named by Frontier Airlines, Inc., being Minnehaha County and Pennington County, by and through the attorney appearing for those Defendants in this action, Assistant Attorney General John Dewell, and good cause appearing therefor, it is hereby

ORDERED that the Complaints filed herein may be and hereby are amended to show that the November 1, 1983 payments owing by each of the above airlines, have now been made, with the same being paid under protest; and it is further

ORDERED that the prior Notices of Protest shall apply to the November 1, 1983 payment; and it is further

ORDERED that the Plaintiffs may proceed as if all statutory requirements had been complied with on the No-

tices of Protest as regards the November 1, 1983 payments; and it is further

ORDERED that the pleadings herein may be amended so as to include not only the payments due on November 1, 1983, but all future payments hereinafter made by the Plaintiffs, until this litigation is finally resolved.

DATED this 23rd day of November, 1983.

BY THE COURT:

/s/Robert A. Miller
Judge

ATTEST:

/s/Mary L. Erickson
Clerk

Memorandum Decision, Sixth Judicial Circuit (Hughes County)

SEE JURISDICTIONAL STATEMENT, APP. B

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

JUDGMENT

This action came on before the court the Honorable Robert A. Miller, Presiding Circuit Judge, and the issues having been duly tried and a decision having been rendered

IT IS ORDERED AND ADJUDGED, that the Plaintiff take nothing and the action be dismissed on the merits.

Dated at Pierre, South Dakota this 23rd day of February, 1984.

BY THE COURT:

/s/Robert A. Miller
Presiding Judge

ATTEST:

/s/Mary L. Erickson
Clerk
By Laura Hildebrandt
Deputy

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

NOTICE OF ENTRY OF
JUDGMENT

Take notice that a Judgment in the above entitled matter was filed in the Office of the Clerk of the Circuit Court, Hughes County, South Dakota on the 23rd day of February, 1984, in favor of the Defendants as above noted and attached hereto.

Dated this 9 day of March, 1984.

/s/John Dewell
John Dewell
Assistant Attorney General

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

STIPULATION AND ORDER

IT IS HEREBY STIPULATED by and between RITER, MAYER, HOFER & RITER, attorneys for the Plaintiffs, Western Air Lines, Republic Airlines, Ozark Air Lines, Continental Airlines, and Frontier Airlines, and John Dewell representing the Defendants listed on the attached Exhibit "A", which is incorporated herein by reference, and particularly the Defendant Counties, Hughes County and Yankton County, and their commissioners and treasurers, as follows:

WHEREAS, this Court has previously entered a Memorandum Decision regarding those matters shown on the attached Exhibit "A", and

WHEREAS, it was the intent of the Court and the parties hereto to include in said Memorandum Decision all of those cases listed on the attached Exhibit "A", inclusive, and

WHEREAS, it appears that the Order entered in the matters of Republic Airlines vs. Hughes County and Richard Ray, its County Treasurer, Republic Airlines vs. Hughes County and its Board of Commissioners, et al., as well as Western Air Lines vs. Hughes County and Richard Ray, its County Treasurer, unintentionally omitted the language consolidating those three actions with the actions otherwise shown on the attached Exhibit "A", although the Stipulations themselves did request consolidation but the Order inadvertently omitted the same, and

WHEREAS, the action of Republic Airlines vs. Yankton County and its Board of Commissioners, et al., does not presently include a Stipulation and Order providing for its consolidation with the other cases listed on the attached Exhibit "A", and

WHEREAS, the appeal of Western Air Lines to Hughes County, South Dakota from the decision of the State Board of Equalization had an Order prepared consolidating the same with those cases listed on the attached Exhibit "A", which Order inadvertently never received the Court's signature, and that it is hereby

AGREED by and between the parties hereto that the cases of Republic Airlines vs. Hughes County and its Treasurer, Richard Ray, Republic Airlines vs. Hughes County and its Board of Commissioners, et al., Western Air Lines vs. Hughes County and its Treasurer, Richard Ray, Republic Airlines vs. Yankton County and its Board of Commissioners, et al., and the appeal of Western Air Lines from the Decision of the State Board of Equalization to Hughes County, may be consolidated and tried with the cases listed on the attached Exhibit "A" and likewise that the Memorandum Decision entered by the Court in this action and the Order and notice thereof entered by the Court, shall apply to all of the cases listed on the attached Exhibit "A", including but not limited to those five matters additionally mentioned herein.

IT IS FURTHER AGREED by the parties that copies of this Stipulation and Order may be filed in each of the five cases named particularly herein, with the same force and effect as if originals thereof were set out.

DATED this 9th day of April, 1984.

RITER, MAYER HOFER & RITER

By: /s/R. C. Riter

R. C. RITER
and: Robert C. Riter, Jr.
Members of said firm
319 S. Coteau - P.O. Box 280
Pierre, SD 57501-0280

/s/John Dewell
Assistant Attorney General
Office of Attorney General
State Capitol
Pierre, SD 57501
Attorney for Defendants

ORDER

Upon the foregoing Stipulation and attached Exhibit "A", and good cause appearing therefore, it is hereby

ORDERED that the venue of the action entitled Republic Airlines, Inc. vs. Yankton County, South Dakota and its Board of Commissioners, et al., shall be and hereby is charged to Hughes County, and it is further

ORDERED that the cases of Republic Airlines vs. Hughes County and its treasurer, Richard Ray, Republic Airlines vs. Hughes County and its Board of Commissioners, et al., Republic Airlines vs. Yankton County and its Board of Commissioners, Western Air Lines vs. Hughes County and its treasurer, Richard Ray, and the appeal of Western Air Lines, Inc. from the decision of the State Board of Equalization to Hughes County, shall be, and hereby are, consolidated with those cases as shown on the attached Exhibit "A", which is incorporated herein by reference, and it is further

ORDERED that this Order of Consolidation shall be applicable to and shall apply in all respects to the Memorandum Decision entered by the Court herein, as well as the written Order given by this Court and notice thereof given by said Defendants, and it is further

ORDERED that a copy of this Stipulation and Order may be filed in those cases particularly named herein, with the same force and effect as if an original Order was entered and set out therein.

DATED this 9th day of April, 1984.

BY THE COURT:

/s/Robert A. Miller
Judge

ATTEST:

/s/Mary L. Erickson
Clerk

EXHIBIT "A"

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
JUDICIAL CIRCUIT

COUNTY OF MINNEHAHA

WESTERN AIRLINES, INC.
a corporation,
Plaintiff,
vs.

CIV. 83-286

MINNEHAHA COUNTY, SOUTH DAKOTA and DeLORIS ERICKSON, as County Treasurer,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
JUDICIAL CIRCUIT

COUNTY OF PENNINGTON

WESTERN AIR LINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-307

PENNINGTON COUNTY, SOUTH DAKOTA and WINONA BRADY, as Treasurer of Pennington County,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SIXTH
JUDICIAL CIRCUIT

COUNTY OF HUGHES

WESTERN AIR LINES, INC.,
a corporation,
Plaintiff,

vs.

CIV. 83-157

HUGHES COUNTY, SOUTH DAKOTA and RICHARD BUD RAY, as Treasurer of Hughes County,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SIXTH
JUDICIAL CIRCUIT

COUNTY OF HUGHES

WESTERN AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-222

HUGHES COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, D. J. HULL, et al.
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
JUDICIAL CIRCUIT

COUNTY OF PENNINGTON

WESTERN AIR LINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-311

PENNINGTON COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, LEO HAMM, et al.,
Defendants.

• •

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT

WESTERN AIR LINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-291

MINNEHAHA COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
M. E. SCHIRMER, et ul.,
Defendants.

• •

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
COUNTY OF PENNINGTON — JUDICIAL CIRCUIT

FRONTIER AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-310

PENNINGTON COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
LEO HAMM, et al.,
Defendants.

• •

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
COUNTY OF PENNINGTON — JUDICIAL CIRCUIT

FRONTIER AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-308

PENNINGTON COUNTY, SOUTH DAKOTA
and WINONA BRADY, as Treasurer
of Pennington County,
Defendants.

• •

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT

FRONTIER AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-292

MINNEHAHA COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
M.E. SCHIRMER, et al.,
Defendants.

• •

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT

FRONTIER AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-287

MINNEHAHA COUNTY, SOUTH DAKOTA
and DeLORIS ERICKSON, as Treasurer
of Minnehaha County,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF MINNEHAHA — SECOND JUDICIAL CIRCUIT

OZARK AIR LINES, INC.,
a corporation,
Plaintiff,
vs.

MINNEHAHA COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, M. E. SCHIRMER, et al.
Defendants.

CIV. 83-290

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF MINNEHAHA — SECOND JUDICIAL CIRCUIT

OZARK AIR LINES, INC.,
a corporation,
Plaintiff,
vs.

MINNEHAHA COUNTY, SOUTH DAKOTA and DeLORIS ERICKSON, as County Tresurer,
Defendants.

CIV. 83-288

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF DAVISON — FOURTH JUDICIAL CIRCUIT

REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-284

DAVISON COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, FORREST GAETZE, et al.,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF DAVISON — FOURTH JUDICIAL CIRCUIT

REPUBLIC AIRLINES, INC.
a corporation,
Plaintiff,
vs.

DAVISON COUNTY, SOUTH DAKOTA and ERWIN VOLK, as County Treasurer,
Defendants.

CIV. 83-283

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF HUGHES — SIXTH JUDICIAL CIRCUIT

REPUBLIC AIRLINES, INC.
a corporation,
Plaintiff,
vs.

HUGHES COUNTY, SOUTH DAKOTA and RICHARD BUD RAY, as County Treasurer,
Defendants.

CIV. 83-153

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF HUGHES — SIXTH JUDICIAL CIRCUIT

REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

HUGHES COUNTY, SOUTH DAKOTA
and its, BOARD OF COMMISSIONERS,
D. J. HULL, et al.,
Defendants.

CIV. 83-221

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
THIRD
JUDICIAL CIRCUIT

COUNTY OF CODINGTON
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CODINGTON COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
EDWARD SPEVAK, et al.,
Defendants.

CIV. 83-295

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
JUDICIAL CIRCUIT

COUNTY OF PENNINGTON
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

PENNINGTON COUNTY, SOUTH DAKOTA

CIV. 83-309

and its BOARD OF COMMISSIONERS,
LEO HAMM, et al.,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
JUDICIAL CIRCUIT

COUNTY OF MINNEHAHA
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

MINNEHAHA COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
M. E. SCHIRMER, et al.,
Defendants.

CIV. 83-289

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
FIFTH
JUDICIAL CIRCUIT

COUNTY OF BROWN
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

BROWN COUNTY, SOUTH DAKOTA
and its BOARD OF COMMISSIONERS,
MERRILL RIX, et al.,
Defendants.

CIV. 83-278

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
FIRST
JUDICIAL CIRCUIT

COUNTY OF YANKTON
REPUBLIC AIRLINES, INC.,

a corporation,
Plaintiff,
vs.
CIV. 83-330

YANKTON COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, DEANE WILLIAMS, et al.,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

COUNTY OF BEADLE
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.
CIV. 83-275

BEADLE COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, CHARLES FLOWERS, et al.,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

COUNTY OF BROOKINGS
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.
CIV. 83-281

BROOKINGS COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, GEORGE MESSNER, et al.,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

COUNTY OF MINNEHAHA
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.
CIV. 83-285

MINNEHAHA COUNTY, SOUTH DAKOTA and DeLORIS ERICKSON, as County Treasurer,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

COUNTY OF BROWN
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.
CIV. 83-277

BROWN COUNTY, SOUTH DAKOTA and ADELINE WIEDERICH, as County Treasurer,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

COUNTY OF YANKTON
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-329

YANKTON COUNTY, SOUTH DAKOTA and IRENE KILLIAN, as County Treasurer,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

COUNTY OF BEADLE
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-276

BEADLE COUNTY, SOUTH DAKOTA and EVIE MAASS HOFER, as County Treasurer,
Defendants,

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

COUNTY OF BROOKINGS
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-282

BROOKINGS COUNTY, SOUTH DAKOTA and KENNETH HARVEY, as County Treasurer,
Defendants.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

COUNTY OF PENNINGTON

REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-306

PENNINGTON COUNTY, SOUTH DAKOTA AND WINONA BRADY, as County Treasurer,
Defendant.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

COUNTY OF CODINGTON
REPUBLIC AIRLINES, INC.,
a corporation,
Plaintiff,
vs.

CIV. 83-296

DONDINGTON COUNTY, SOUTH DAKOTA and MARGARET MCNULTY,
as County Treasurer,
Defendants.

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

COUNTY OF MINNEHAHA
IN THE MATTER OF THE APPEAL OF REPUBLIC AIRLINES, INC.,
FROM THE DECISION OF THE STATE BOARD OF EQUALIZATION.

CIV. 83-319

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

COUNTY OF PENNINGTON
IN THE MATTER OF THE APPEAL OF REPUBLIC AIRLINES, INC.,

CIV. 83-340

FROM THE DECISION OF THE STATE
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
COUNTY OF PENNINGTON — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF CONTINENTAL AIRLINES CORPORATION
FROM THE DECISION OF THE
STATE BOARD — CIV. 83-342
OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
FIFTH
COUNTY OF BROWN — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF REPUBLIC AIRLINES, INC.,
FROM THE DECISION OF THE STATE — CIV. 83-326
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
THIRD
COUNTY OF CODINGTON — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF REPUBLIC AIRLINES, INC. — CIV. 83-316
FROM THE DECISION OF THE STATE
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
FIRST
COUNTY OF YANKTON — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF REPUBLIC AIRLINES, INC., — CIV. 83-331

FROM THE DECISION OF THE STATE
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SIXTH
COUNTY OF HUGHES — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF WESTERN AIR LINES, INC.
FROM THE DECISION OF THE STATE — CIV. 83-244
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
COUNTY OF PENNINGTON — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF WESTERN AIR LINES, INC. — CIV. 83-343
FROM THE DECISION OF THE STATE
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF WESTERN AIR LINES, INC.
FROM THE DECISION OF THE STATE — CIV. 83-320
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF OZARK AIR LINES, INC.,
FROM THE DECISION OF THE STATE — CIV. 83-318

BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SECOND
COUNTY OF MINNEHAHA — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF FRONTIER AIRLINES, INC.
FROM THE DECISION OF THE STATE — CIV. 83-317
BOARD OF EQUALIZATION.

* *

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT
SEVENTH
COUNTY OF PENNINGTON — JUDICIAL CIRCUIT
IN THE MATTER OF THE APPEAL
OF FRONTIER AIRLINES, INC.
FROM THE DECISION OF THE STATE — CIV. 83-341
BOARD OF EQUALIZATION.

* *

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

WESTERN AIR LINES, INCORPORATED, a corporation, *et al.*,
Plaintiffs,

vs.

HUGHES COUNTY, SOUTH DAKOTA and its BOARD OF COMMISSIONERS, *et al.*,
Defendants.

NOTICE OF APPEAL

TO: John Dewell, Assistant Attorney General, Attorney for all of the consolidated Defendants and to George H. Danforth, Beadle County State's Attorney, Clyde R. Calhoon, Brookings County State's Attorney, Marilyn J. Marshall, Brown County State's Attorney, Roger W. Ellyson, Codington County State's Attorney, Patrick W. Kiner, Davison County State's Attorney, Steven L. Zinter, Hughes County State's Attorney, Joaquin K. Hanson, Minnehaha County State's Attorney, Rodney C. Lefholz, Bennington County State's Attorney and Larry F. Hosmer, Yangton County State's Attorney, attorneys for the respective named counties and their officers and commissioners:
PLEASE TAKE NOTICE that the Plaintiffs, Western Air Lines, Republic Airlines, Frontier Airlines, Ozark Air Lines and Continental Airlines, appeal to the Supreme Court of the State of South Dakota, from the final Judgment rendered in this action on February 23, 1984 with Notice thereof having been given on March 9, 1984, the cases having been consolidated by the Circuit Court pursuant to Stipulations of the various parties and Orders entered prior hereto by the Court so that all of the actions shown on

the attached Exhibit "A", which is incorporated herein by reference, are consolidated into this one proceeding and this one appeal; and said appeals are united in this Notice and in the undertaking and in all of the future proceedings into a single appeal.
DATED this 9th day of April, 1984.

RITER, MAYER, HOFER & RITER

By: /s/Robert C. Riter, Jr.
Members of said firm
310 S. Coteau - P.O. Box 280
Pierre, SD 57501-0280
Attorneys for Plaintiffs

Opinion, Supreme Court of South Dakota

SEE JURISDICTIONAL STATEMENT, APP. A

Judgment on Appeal

SEE JURISDICTIONAL STATEMENT, APP. C

Notice of Appeal to the Supreme Court of the United States

SEE JURISDICTIONAL STATEMENT, APP.D

No. 85-732 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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APPELLANTS' BRIEF

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QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property" in the same jurisdiction. The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 1513(d)(2)(D). Does this definition permit a state to escape § 1513(d)'s prohibition by wholly exempting most business property from taxation, while simultaneously imposing a tax on air carrier transportation property?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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APPELLANTS' BRIEF

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (Juris. St., App. A at 1a) is reported at 372 N.W.2d 106 (S.D. 1985).[1] The decision of the Circuit Court

[1] "Juris. St." refers to Appellants' jurisdictional statement. "J.A." refers to the Joint Appendix. The parties below are listed at J.A. 1-3. Plaintiffs included, in addition to the appellants here, Continental Airlines Corporation. The names of individual defendants, all of whom were sued only in their capacities as state or county officials, are not listed. *See infra*, A-18, for changes in corporate affiliations.

for the Sixth Judicial Circuit of South Dakota (Juris. St., App. B at 13a) is unreported.

JURISDICTION

The judgment of the Supreme Court of South Dakota (Juris. St., App. C at 22a), sustaining the validity of the South Dakota flight property tax (S.D. Codified Laws Ann. § 10-29 (1982)) against a challenge based on the Supremacy Clause (U.S. Const. art. VI, cl. 2) and laws of the United States (49 U.S.C. § 1513(d)), was entered on July 31, 1985. The notice of appeal to the Court (Juris. St., App. D at 23a) was filed with the South Dakota Supreme Court on October 9, 1985. Appellants' jurisdictional statement was filed with the Court on October 29, 1985. The Court noted probable jurisdiction on February 24, 1986. Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appendix A, *infra*, A-1 sets forth pertinent portions of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 1513(d).

B. South Dakota Codified Laws Annotated, §§ 10-4-6.1; 10-6-33; 10-6-34.1; 10-29-2; 10-29-8 (1982).

C. United States Constitution, article VI, clause 2 (the Supremacy Clause).

STATEMENT OF THE CASE

In the proceedings below, four interstate air carriers providing commercial air service to airports in South Dakota challenged discriminatory state property taxes as violative of § 7(d) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513(d). This federal statute prohibits a state from assessing, levying or collecting property taxes that discriminate against interstate air carriers, declaring that such taxes are an unreasonable burden on interstate commerce. Under § 1513(d), discrimination exists when air carrier transportation property is assessed at a higher ratio or taxed at a higher rate than the average applied to other property in the same assessment jurisdiction "devoted to commercial or industrial use and subject to a property tax levy." § 1513(d)(2)(D).

The airlines alleged a violation of § 1513(d) because the state separately classified and taxed the flight property "of airline companies," while at the same time wholly exempting from taxation most of the state's other business personalty. The state argued that the tax was an "in lieu" tax, permissible under § 1513(d)(3).

The carriers' challenge ultimately was rejected by a divided South Dakota Supreme Court, which held that § 1513(d) did not preempt the state's flight property tax. The majority, discovering a rationale that not even the state had suggested, found that non-airline business personalty exempted by the state from taxation is not commercial and industrial property "subject to a property tax levy" under § 1513(d), and thus cannot be used for discriminatory ratio or rate

comparisons. This appeal challenges that interpretation of § 1513(d).

1. Operation of South Dakota's Flight Property Tax.

In 1961, South Dakota imposed upon the flight property "of airline companies" serving South Dakota a centrally assessed tax, *i.e.*, a tax assessed by the state's Department of Revenue, rather than by local county or city taxing authorities. 1961 S.D. Sess. Laws 449, S.D. Codified Laws Ann. §§ 10-29-2, -8 (1982). Each of the airlines' aircraft "fully equipped ready for flight used in interstate commerce" was valued at a percentage of its total value, the percentage being determined by the proportion of the airline's total operations (measured by flight time, revenue ton miles, and tonnage of passengers and freight received and discharged) conducted within the state. S.D. Codified Laws Ann. § 10-29-10 (1982). The aircraft so valued then were assessed at up to 60% and taxed at the average mill rate paid on all property, both real and personal, within the state. S.D. Codified Laws Ann. §§ 10-6-33, -29-14 (1982). The taxes so determined were allocated for collection to each county containing an airport served by the airline, and were to be used exclusively for such airports. S.D. Codified Laws Ann. § 10-29-15 (1982).[2]

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[2] By way of illustration, appellant Western Air Lines, Inc. ("Western") reported to the South Dakota Department of Revenue that during 1982 Western owned or leased forty-eight Boeing 727-200 aircraft with a total depreciated value of $244,287,355. App. B, *infra*, A-8. Western calculated that its operations within South Dakota generated 0.242% of the tonnage carried by these forty-eight aircraft during 1982; 0.082% of their hours flown; and 0.095% of their revenue ton miles. *Id.* at A-8. The state tax appraiser averaged these three percentages,

2. Origin of the Federal-State Conflict.

When the flight property tax was enacted in 1961, South Dakota also taxed other business-related personal property. These latter taxes were repealed in 1978. After that date, all personal property that was not centrally assessed was classified for *ad valorem* tax purposes and was exempted from taxation. S.D. Codified Laws Ann. § 10-4-6.1 (1982). However, the state retained central assessment and classification—and thus taxation—for "flight property of airline companies operating in the state." S.D. Codified Laws Ann. § 10-29-2 (1982).[3]

In 1982, the U.S. Congress determined that several specified taxing practices of the states "unreasonably burden and discriminate against interstate commerce," and amended the Airport Development Acceleration Act of 1973 to forbid such practices. 49

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applied the resulting factor of 0.140% to the aircraft's depreciated value, and thereby valued these forty-eight aircraft for tax purposes at $342,000. *Id.* at A-10. A similar set of calculations applied a factor of 6.392% to the $37,859,921 depreciated value of fourteen Boeing 737-200 aircraft owned or leased by Western, yielding a taxable value of $2,420,000. *Id.*

The resulting total $2,762,008 of Western flight property was assessed at $1,432,772, or 51.9%. The assessed value was taxed at an average mill rate of 54.35. *Id.* at A-14, A-15. Western's 1983 South Dakota property taxes thus were computed to be $77,871. The total in 1983 for all air carriers was $194,455. *Id.* at A-15. This amount was allocated for collection among the nine different counties served by the airlines. *Id.* at A-17.

[3] Central assessment was also retained for public service companies, such as railroads, telephone and telegraph companies, electric utilities and pipeline companies. S.D. Codified Laws Ann. §§ 10-6-34.1, -28-1, -33-10, -34-8, -35-2, -37-9 (1982).

U.S.C. § 1513(d).[4] This 1982 amendment prohibited the states from assessing "air carrier transportation property" at a higher proportion of market value than the assessment ratio applied to "other commercial and industrial property of the same type in the same assessment jurisdiction," or from levying or collecting a tax based on such a discriminatory assessment. The states also were forbidden to levy or collect an *ad valorem* property tax at a rate exceeding that applicable to commercial and industrial property. 49 U.S.C. § 1513(d)(1); App. A, *infra*, at A-1. It is undisputed that the flight property taxed by South Dakota falls within § 1513(d)'s definition of "air carrier transportation property."

3. Lower Court Proceedings.

Based on this newly enacted federal statute, each of the four appellant airlines in May 1983 paid under protest its property taxes levied for the first six months of 1983. *See* S.D. Codified Laws Ann. § 10-27-2 (1982). They then sued the appropriate county treasurers for a refund.[5] The county's answer in each

[4] This amendment, adding subsection (d) to section 7 of the Act, Pub. L. No. 93-44, § 7, 87 Stat. 90 (codified as amended at 49 U.S.C. § 1513(d) (1976 & Supp. 1986)), was enacted as § 532 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, 701 (codified at 49 U.S.C. § 1513(d) (Supp. 1986)).

[5] The Joint Appendix includes, as representative of these fifteen actions, the complaint and answer in Western Air Lines, Inc. v. Hughes County Treasurer, No. 83-157 (S.D. Cir. Ct. filed May 27, 1983). J.A. 6. Each complaint alleged that the defendant county had "attempted to levy and collect tax upon Plaintiffs' air carrier transportation property, and to treat the same differently than similar property which is otherwise exempt

case (1) admitted payment of the taxes and the tax-exempt classification of non-centrally assessed property; (2) denied any violation of § 1513(d); and (3) alleged that the disputed tax "is utilized wholly for airport and aeronautical purposes and is in lieu of property taxes and is therefore permitted by 49 U.S.C. § 1513(d)(3)." J.A. 10-11.

In April 1983, each airline also requested the board of commissioners of each of seven counties to abate and refund property taxes collected after September 3, 1982—the effective date of the federal statute. J.A. 17; *see* S.D. Codified Laws Ann. § 10-18-5, -8 (1982). The denial of these requests led to another series of lawsuits, naming the county commissioners as defendants and seeking abatement and refund of the taxes paid.[6]

Finally, each of the four airlines also appealed its property tax assessment to the South Dakota State Board of Equalization, asserting that § 1513(d) "specifically restricts the State of South Dakota . . . from assessing, levying and collecting the tax sought to be imposed." J.A. 26; *see* S.D. Codified Laws Ann. § 10-29-12 (1982). The Board of Equalization unanimously denied the airlines' appeals. J.A. 29. Acting on the advice of its attorney (J.A. 29), the Board concluded that "the airline flight property tax is in lieu of personal property tax and is totally utilized for airport

from taxation pursuant to the South Dakota statute, thereby violating the federal statutes [49 U.S.C. § 1513]." J.A. 8.

[6] The Joint Appendix includes, as representative of these actions, the complaint and notice of appeal in Western Air Lines, Inc. v. Hughes County, South Dakota, and Its Board of Commissioners, No. 83-222 (S.D. Cir. Ct. filed August 4, 1983). J.A. 13, 23.

and aeronautical purposes, therefore, in conformity with Section 1513(d)(3), this tax is lawful and not a violation of federal law." J.A. 31. The four airlines appealed the Board's denials to the appropriate circuit courts, contending that § 1513(d) "specifically restricts the State of South Dakota and the various local governments from assessing, levying, and collecting the tax sought to be imposed." J.A. 33.[7]

The forty-two cases generated by this controversy all were consolidated in the Circuit Court for the Sixth Judicial Circuit in Hughes County, South Dakota. J.A. 44.[8] In February 1984, the circuit court issued a single memorandum decision disposing of these cases. Juris. St., App. B at 13a. The circuit court believed itself "not required to delve into the issue of whether this tax is burdensome or discriminatory." *Id.* at 21a. Instead, the circuit court sustained the state's tax as an "in lieu" tax of the type permitted under the federal statute. *Id.* at 20a.

4. Opinion of the South Dakota Supreme Court.

On appeal, a divided South Dakota Supreme Court affirmed the circuit court's judgment, but on a different basis. The court unanimously held that the circuit court had erred in sustaining the flight property

[7] The Joint Appendix includes, as representative of these proceedings, the certified record of the Board of Equalization and the notice of appeal to the circuit court in In re Western Air Lines, Inc., No. 83-343 (S.D. Cir. Ct. filed August 31, 1983). J.A. 24. A twelfth appeal was filed by Continental Airlines, who is not a party in the Court. *See* J.A. 4.

[8] In November 1983, a stipulated order applied the outcome of these cases also to taxes due in the second six months of 1983 and to all future flight property taxes. J.A. 34, 37.

tax as an "in lieu" tax.[9] *Western Air Lines, Inc. v. Hughes County,* 372 N.W.2d 106, 109-111 (S.D. 1985) ("*Western Air Lines*"); Juris. St., App. A at 5a-6a, 9a. While not denying the tax's discriminatory effect, the supreme court nonetheless upheld the tax, concluding in essence that while the law prohibits partial, it permits total, property tax discrimination against air carriers.

Section 1513(d)(2)(D) defines "commercial and industrial property" as property "devoted to commercial or industrial use *and subject to a property tax levy*" (emphasis added). Because the state exempted from taxation non-centrally assessed business property (S.D. Codified Laws Ann. § 10-4-6.1 (1982)), the court reasoned that this property was not "subject to a property tax levy," and therefore was not "commercial and industrial property" within the meaning of § 1513(d). *Western Air Lines,* 372 N.W.2d at 110; Juris. St., App. A at 7a. Thus the court held that § 1513(d) precluded consideration of this tax-exempt property for discriminatory ratio or rate comparison. This theory had not been advanced by the state or considered by the trial court.

The dissenting judge criticized the majority's opinion as "unreasonable," permitting as it does a

[9] The supreme court defined the term "in lieu tax" to be a tax that is instead of, or is a substitute for, another tax, and is not an additional tax. It found the South Dakota tax to be the first imposition of personal property tax on the flight property, and not a substitute for an *ad valorem* personal property tax. Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106, 109; Juris. St., App. A at 1a, 5a-6a. *Accord,* Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515, 518 (N.D. 1984).

"greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate." *Western Air Lines,* 372 N.W.2d at 112 (Henderson J., dissenting). He agreed fully with the contrary result reached by the North Dakota Supreme Court in *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W.2d 515 (N.D. 1984). Citing *Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 10, n.3 (1983) ("*Aloha*"), Judge Henderson emphasized that "Congress' intent in enacting § 1513(d) was 'to prohibit discriminatory property taxes imposed on air carriers.' " He viewed the majority's opinion as "ludicrous and absurd," and noted that "a construction that accords with reason is to be preferred to a literal construction involving a palpable absurdity." *Western Air Lines,* 372 N.W.2d at 112 (citations omitted); Juris. St., App. A at 11a. Section 1513(d) required, in the dissenting judge's opinion, that "since the level of assessment on commercial and industrial property is zero, the level of assessment on the airlines' personal property must be reduced to zero." *Id.*

The four airlines filed a notice of appeal on October 9, 1985, invoking the Court's jurisdiction under 28 U.S.C. § 1257(2). Juris. St., App. D at 23a. After considering the airlines' jurisdictional statement and the state's response, the Court, on February 24, 1986, noted probable jurisdiction.

SUMMARY OF ARGUMENT

The purpose of § 7(d) of the Airport Development Acceleration Act (49 U.S.C. § 1513(d)) is to forbid the states from imposing discriminatory taxes on the transportation property of interstate airlines. Ignoring this purpose and the voluminous legislative history which confirms it, the contrary opinion of the North Dakota Supreme Court, and this Court's opinion in *Aloha,* 464 U.S. 7, the South Dakota Supreme Court construed the phrase "subject to a property tax levy" to produce a result patently inconsistent with Congress' intent.

It is undisputed that § 1513(d) would prohibit South Dakota from lowering the assessment ratio or tax rate applied to other commercial and industrial property without also lowering the assessment ratio or tax rate applied to air carrier transportation property. But the South Dakota Supreme Court held that if a state lowers the assessment ratio or the tax rate for other commercial and industrial property to zero by exempting that property from all taxation, then no corresponding reduction need be made in the tax on air carrier transportation property. According to the South Dakota court, property labeled by the state as "exempt" completely disappears from the comparison class against which air carrier transportation property must be measured because such exempt property is not "subject to a property tax levy" within the meaning of § 1513(d).

The phrase "subject to a property tax levy" is susceptible of conflicting interpretations. The South Dakota court had an obligation to construe that phrase consistently with the statute's purpose. The legislative history of § 1513(d) makes clear that these words were not intended to permit the wholesale exclusion of commercial and industrial property from the comparison class. Rather, the phrase was intended to exclude only property traditionally exempt from state taxation, such as property for government or charitable

use. Neither the legislative history nor common sense supports the reading given by the South Dakota court.

ARGUMENT

The airline appellants contend that the South Dakota flight property tax violates § 1513(d) because it: (1) assesses airline flight property at a higher ratio than the average for other commercial and industrial property in the state in violation of § 1513(d)(1)(A); (2) imposes a tax based on that assessment in violation of § 1513(d)(1)(B); and (3) imposes a tax rate on such property which is higher than the average for other commercial and industrial property in the state in violation of § 1513(d)(1)(C).

The South Dakota Supreme Court rejected the airlines' contention essentially in two sentences:

> Commercial and industrial property as used in [§ 1513(d)(1)] (A) and (C) is defined to mean property, other than transportation property and land used for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*. 49 U.S.C. § 1513(d)(2)(D). The locally assessed personal property, being exempt from property tax levy, cannot be included as commercial or industrial property for comparison under either (A) or (C). (Emphasis in original.)

Western Air Lines, 372 N.W.2d at 110; Juris. St., App. A at 7a.

In reaching this conclusion about the meaning of "subject to a property tax levy", a conclusion described by the dissenting judge as a "palpable absurdity," (372 N.W.2d at 112; Juris. St., App. A at 11a), the South Dakota court did not examine the purpose of the statute, preferring instead to rely on an Eighth Circuit opinion which held a state tax *invalid* under a provision which has no counterpart in § 1513(d). In so doing, the South Dakota court ignored the Court's repeated admonition to appraise "the purpose as a whole of Congress in analyzing the meaning of clauses or sections . . ." *United States v. American Trucking Assoc.,* 310 U.S. 534, 544, *reh'g denied,* 311 U.S. 724 (1940); *United States v. Morton,* 467 U.S. 822 (1984). As recently as last term, the Court noted that "the overall purpose of the statute is a useful referent when trying to decipher ambiguous statutory language . . ." *Exxon Corp. v. Hunt,* 54 U.S.L.W. 4249, 4254 (1986).

In selecting one of several possible interpretations of the phrase "subject to a property tax levy,"[10] the South Dakota court should have recognized, as this Court already has done, that § 1513(d) was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha,* 464 U.S. at 10, n.3 (1983). The North Dakota Supreme Court did just that, specifically rejecting the interpretation later adopted by the South Dakota court as leading to "ludicrous and absurd results." *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W.2d 515, 517 (N.D. 1984).

Had the South Dakota court paid even the slightest attention to the legislative history of § 1513(d) and

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[10] Property "subject to" a tax levy could refer, for example, to all property that the states had the power to tax. Or it could refer to all property except that traditionally exempted by the states from taxation when Congress was considering the legislation. *See* part II, *infra,* pp. 21-26.

its predecessor statutes, that court would have discovered that Congress intended to equalize the taxes on property of airlines with those of all other owners of business property, and that Congress intended to prohibit the precise discrimination practices against carrier property engaged in by South Dakota. That legislative history also shows that the statutory phrase "subject to a property tax levy," was not intended to allow the sort of wholesale discrimination practiced by South Dakota, but rather to allow for exclusion from the comparison class of "commercial and industrial property" only those limited classes of property which had traditionally been exempt from state taxation.

I. The Purpose Of Section 1513(d) Is To Prohibit State Discrimination Against Air Carrier Transportation Property As Compared To Other Business Property. This Is Precisely The Discrimination Embodied In South Dakota's Statutes.

In enacting § 1513(d), Congress expressed its intent and the statute's purpose in clear, unequivocal language, declaring that certain specified practices "unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them." § 1513(d)(1).

Section 1513(d)'s extensive legislative history shows an overwhelming congressional intent to prohibit tax discrimination against interstate carriers, and a specific intent to prohibit exactly the kind of discrimination now practiced by South Dakota. The statute was modeled on § 31(a) of the Motor Carrier Act of 1980, which prohibited discriminatory state taxation of motor carrier property as compared to other commercial and industrial property.[11] The Committee reports make clear that § 1513(d) was intended to make applicable to air carriers the prohibitions of § 31(a).[12] The Motor Carrier Act in turn followed almost verbatim the language of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act").[13] The definitional section at issue before the Court is identical in all three statutes.

Section 306's legislative history shows that congressional concern about discriminatory state property taxes began as early as 1944, provoked primarily by the increasingly heavy tax burden borne by the railroads, and the resulting added costs to consumers.[14]

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[11] Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823, (codified as amended at 49 U.S.C. § 11503(a) (Supp. 1985), *amended by* the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1122 (codified at 49 U.S.C. § 11503(a) (Supp. 1985)). *See also* H.R. Rep. No. 1069, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. Code Cong. & Ad. News 2327.

[12] H.R. Rep. No. 760, 97th Cong., 2d Sess. 722 reprinted in 1982 U.S. Code Cong. & Ad. News, 1190, 1484.

[13] Pub. L. No. 94-210,§ 306, 90 Stat. 31, 54, (as re-codified at 49 U.S.C. 11503 (Supp. 1985)). Section 306 of the 4-R Act was originally codified at 49 U.S.C. § 26(c) (1976), but in the three years between the law's enactment and its effective date, the statute was recodified by the Revised Interstate Commerce Act of 1978, Pub. L. 95-473, § 11503, 92 Stat. 1337, 1445, and is now found at 49 U.S.C. § 11503 (Supp. 1985). Differences between the original § 306 and its recodification in 49 U.S.C. § 11503 were not intended to affect its meaning. Pub. L. No. 95-473, 92 Stat. 1337 (1978). *See also* Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255 (10th Cir. 1981).

[14] *See* House Document 160, September 19, 1944, "Letter From Board Of Investigation and Research Transmitting A Report On Carrier Taxation", pp. 124-25: "The officials of approximately

In 1959-60, Senate Resolutions 29, 151 and 244 of the 86th Congress ordered a special study group to prepare and submit a national transportation policy report, to include recommendations on means to eliminate state and local discriminatory taxation of various common carriers.

The resulting study, called the "Doyle Report," S. Rep. No. 445, 87th Cong., 1st Sess. (1961), found that, despite state laws requiring uniform tax treatment, common carrier property was discriminated against as compared to other business property in the same jurisdiction. The Report noted the "studied and deliberate practice" of assessing railroad property at a proportion of full value "substantially higher" than other similar business property. S. Rep. No. 445, *supra*, at 458. Among its recommendations, the Doyle Report endorsed a new proposal offered by the Association of American Railroads ("AAR") designed to ensure that common carriers "are accorded equal tax treatment." *Id.* at 466.[15]

The AAR proposal triggered the introduction during the next seven Congresses of various bills, predecessors of 306, designed to prohibit, as an

half the states readily concede that railroads are being overtaxed because of inadequate equalization", quoted in S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 630, 91st Cong., 1st Sess. 4 (1969).

[15] The Report noted that passage of such an antidiscrimination tax provision for all interstate common carriers would be a "significant measure" in the relief of unduly burdensome state taxes on interstate commerce, and "would mark that assumption of control by Congress in the field of taxation of interstate commerce so vital to unhampered commerce between the States." S. Rep. No. 445, *supra*, at 466.

unreasonable burden upon interstate commerce, discriminatory state assessment and taxation of common carrier property.[16] Committee reports from Congresses prior to the 94th, when § 306 was enacted, make clear that these bills were intended to terminate the "widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district." *See, e.g.*, S. Rep. No. 630, 91st Cong., 1st Sess. 17, 18 (1969).[17]

[16] Although the 4-R Act was passed four years before the Motor Carrier Act, initial congressional analysis focused on interstate carriers in general and was not limited to the railroads. For early consideration, *see, e.g.*, H.R. 7421, 87th Cong., 1st Sess., 107 Cong. Rec. 9375 (1961); *Tax Assessments on Common Carrier Property, Hearing on H.R. 736 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); *Tax Assessments on Common Carrier Property, Hearings on H.R. 4972 before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. (1967) "(*1967 Hearings*)"; S. 927, 90th Cong., 1st Sess., 113 Cong. Rec. 1887 (1967); S. 2289, 91st Cong., 1st Sess., 115 Cong. Rec. 14333 (1969). Courts have relied extensively on 306's predecessor bills. "The legislative history of these prior bills provides greater insight into Congress' intent in passing [49 U.S.C.] § 11503"; the courts thus properly may "rely on the legislative histories of these prior bills . . . in interpreting § 11503." Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865, n.6 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983). *Accord*, Arizona v. Atchison T. & S. F. Ry. Co., 656 F.2d 398, 404, n.6 (9th Cir. 1981); Burlington N. R.R. Co. v. Lennen, 715 F.2d 494, 497 (9th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984); Atchison T. & S. F. Ry. Co. v. Lennen, 732 F.2d 1495, 1497, n.1 (10th Cir. 1984).

[17] Relying on the Doyle Report's findings, the Senate Com-

The legislative history also shows that Congress intended specifically to prohibit the practices now engaged in by South Dakota. As early as 1968, the Senate Commerce Committee expressed its intention to outlaw the growing practice of "classifying carrier property in a separate class from all other taxable property in the same district,"[18] a practice that could

merce Committee noted that "Unfortunately, interstate carriers, especially railroads, are easy prey for state and local tax assessors. Railroads . . ., and other interstate carriers are nonvoting, often nonresident, targets for local taxation." S. Rep. No. 1483, *supra* note 14, at 2 (1968); S. Rep. No. 630, *supra* p. 17, at 1.

[18] S. Rep. No. 1483, *supra* note 14, at 7; S. Rep. No. 630, *supra* p. 17, at 17, 18. The Committee's concern arose because the imposition of such classifications, and the resulting discriminatory taxes, often followed a successful court action by railroads or other carriers affording relief from discriminatory tax assessment practices. The Committee noted that:

> For example, in 1965 the Kentucky Court of Appeals held that all assessment should be at 100 percent of value. Prior to that time railroads and utilities had been assessed at a higher proportion of value than the proportion of value at which other property was assessed. Shortly after the decision was handed down, the committee was advised that the Governor of Kentucky called the general assembly into special session, and implementing legislation was enacted to match the sharply increased assessment valuation. However in order to insure that the State would continue to be able to collect higher discriminatory taxes from railroads and utilities, a bill was enacted which 'classified' railroads and utilities at a higher effective rate that [sic] the rate applicable to other property.
>
> Within the last year, the committee was advised measures designed to classify railroads and public utilities at different and higher tax rates have been introduced or considered in the following states: Alabama, Arizona, California, Kansas,

not be remedied except by Congressional action.[19] The Committee noted that "an ominous trend is the consideration being given by more and more states to the utilization of classification, that is, higher tax rates on transportation and utility company property, as the most effective means of perpetuating tax discrimination." S. Rep. No. 1483, *supra* note 14, at 5.[20] The Committee thus expressly condemned state attempts to classify carrier property separately from other business property and thereby to tax it at a higher rate, and bills thereafter reported by the Committee prohibited discriminatory rates as well as assessment practices. *See, e.g.*, S. Rep. No. 1483, *supra* note 14, at 7; S. Rep. No. 630, *supra* p. 17, at 8.[21]

Montana, Tennessee, and Utah.

S. Rep. No. 1483, *supra* note 14, at 5.

[19] Unlike the problem of discriminatory assessments or valuations, some of which had been struck down by the courts, there were at the time no cases limiting the power of state and local authorities to impose discriminatory taxes when state law so permitted. *See* S. Rep. No. 630, *supra* p. 17, at 17-18, and cases there cited. Indeed, in Nashville, C. & S. L. Ry. v. Browning, 310 U.S. 362 (1940), the Court had ruled that such discriminatory classification did not violate the Equal Protection Clause of the Fourteenth Amendment.

[20] One example called to the Senate Committee's attention was a proposal then pending in Alabama to classify and tax railroads and utilities at 40 percent, while other commercial and industrial property was taxed at only 25 percent. *1967 Hearings, supra* note 16, at 14, 38.

[21] The Senate Committee made clear, however, that it did not intend to abrogate the right of a state to classify property for rate purposes according to the traditional breakdowns of real property, tangible personal property and intangible personal property, provided there is no discrimination within these classes

This specific intent and the statute's broad purpose were reaffirmed by the 94th Congress, which finally enacted § 306 to "prohibit states and localities from imposing discriminatory taxes on the transportation property of railroads." H. R. Rep. No. 725, 94th Cong., 1st Sess. 76 (1975).

These objectives were underscored by the actions of the Conference Committee. The bill reported by the Senate Committee in the 94th Congress, while similar to the House bill in its key provisions, contained language that made it inapplicable to any state which then had in effect a constitutional provision for the reasonable classification of property. The Conference Committee specifically rejected such an exception to the bill's antidiscriminatory purpose.[22]

Congress prohibited the same forms of discrimination against air carrier property in enacting § 1513(d). As noted, § 1513(d) copied in pertinent part the language of § 306. The record shows that Congress was reacting to complaints by the airlines about discriminatory taxation similar to those previously voiced by the railroads and motor carriers. The President of the Air Transport Association ("ATA"), in proposing § 1513(d), noted that four states had adopted constitutional amendments under which "airline property has been classified as property of utilities and taxed at a rate which is higher than that applied to other business and commercial property." *Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 216-17 (1981). ATA urged that the provisions of the 4-R Act and the Motor Carrier Act[23] prohibiting this form of discrimination against the transportation property of railroads and motor carriers be extended to airline property. Congress responded by enacting § 1513(d).

of property. S. Rep. No. 1483, *supra* note 14, at 11; S. Rep. No. 630, *supra* p. 17, at 11.

[22] S. Rep. No. 585, 94th Cong., 1st Sess. 166 (1975); S. Rep. No. 595, 94th Cong., 2d Sess. 13 (1976). *See also*: H.R. Rep. No. 725, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 781, 94th Cong., 2d Sess. 138-39 (1976). This was the second unsuccessful attempt by the Senate to accommodate such an amendment to the Constitution of Tennessee. In 1972, the Senate adopted a bill (S. 3945, which would have allowed state constitutional provisions classifying real property owned by a railroad or public utility for assessment at a higher proportion of its value than other industrial and commercial property. *See* S. Rep. No. 1085, 92d Cong., 2d Sess. 6-7 (1972).

II. The South Dakota Court Erred In Failing To Construe The Words "Subject To A Property Tax Levy" Consistently With The Statute's Purpose. The Phrase Was Intended To Permit Exclusion From The Comparison Class Only Of Limited Types Of Property Traditionally Exempt From State Taxation.

Although the South Dakota court's opinion turned entirely on the meaning of the phrase "subject to a property tax levy", the court failed to explore Congress' reasons for including that language in § 1513(d). Had the court done so, it could not possibly have ascribed to the phrase such a profound meaning.

[23] Proponents of § 31(a) of the Motor Carrier Act testified that the legislation would "prevent state or local governments from assessing or taxing transportation property of ICC regulated bus lines on a discriminatory basis, as compared to other business property . . . ." *Deregulation of the Intercity Bus Industry: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 97th Cong., 2d Sess. 218 (1982).

The legislative history of the phrase in § 1513(d) leads again to the statute's lineal ancestor, § 306 of 4-R Act. That history begins with the proposal sponsored by the AAR and described in the Doyle Report which would have prohibited assessment of common carrier property at a higher ratio than that applicable to "all other property in the taxing district *subject to the same property tax levy.*"[24] This language later appeared in bills introduced in both the 88th and 89th Congresses, *e.g.*, H.R. 736 (88th Cong.), H.R. 4972 (89th Cong.), and S. 2289 (89th Cong.).

Subsequently, in a bill (S. 927) considered by the Senate in the 90th Congress, the words "the same" were dropped without explanation, so that the phrase read "subject to a property tax levy." At the same time, a new provision prohibiting discriminatory tax rates was added.[25] Although the words "subject to a property tax levy" remained in the bill's prohibition of discriminatory assessments, they were not included in the prohibition addressing discriminatory tax rates. Nevertheless, in referring to the new provision, which used as the comparison class "any other property in the taxing district," the committee report stated:

> The phrase 'any other property in the taxing district' is not intended to interfere or restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like. In other words, property totally or partially exempted is not intended

[24] S. Rep. No. 445, *supra* p. 16, at 465 (Emphasis added).

[25] Such a provision appears in 49 U.S.C. § 1513(d)(1)(C).

> to be taken as a measure of "any other property" for tax rate purposes.[26]

Subsequent versions of bills considered in the 91st, 92nd and 93rd Congresses continued to use the term "subject to a property tax levy" solely in connection with the prohibition on discriminatory assessments.[27] During this period the description of property used as the comparison class changed from "all other property", to "all other commercial and industrial property" and a definition of the latter term was included. The change had been proposed by the Department of Transportation during the 90th Congress, and was intended to make clear that states would retain some latitude in classifying property "*unrelated* to business or commercial use." S. Rep. No. 630, *supra*, p. 17, at 24 (emphasis added).

In the 94th Congress, the bill passed by the House (H.R. 10979), followed the pattern of earlier bills with respect to the term "subject to a property tax levy." However, a bill introduced by the Chairman of the Senate Commerce Committee (S. 2265) shifted the words "subject to a property tax levy" from the as-

[26] S. Rep. No. 1483, *supra* note 14, at 11. The Committee report adopted almost verbatim the testimony of an AAR witness:

> Furthermore, it is our understanding that subsection (c) of the bill is not intended to interfere with or restrict State action in extending total or partial exemption to property of any class, such as churches, charitable institutions, homesteads, and the like.

1967 Hearings, supra note 16, at 82.

[27] *See, e.g.*, H.R. 16281, 92d Cong., 2d Sess. (1972); S. 927, 92d Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973).

sessment prohibition to the definition of "commercial and industrial property." As defined, "commercial & industrial property" established the comparison class for tax rate as well as assessment purposes. The bill reported by the Senate Committee, the comprehensive 4-R Act (S. 2718), followed the same approach. The Senate provisions on discriminatory taxation were adopted by the Conference Committee, except for the provision permitting discrimination embodied in state constitutions. The shift of the term "subject to a property tax levy" to the definitional section was retained in the enacted version. None of the hearings, committee reports or debates concerning either the Senate or House bills in the 94th Congress discuss the term "subject to a property tax levy" or the reason for shifting it to the definitional section of the bill.

This history, and the other circumstances surrounding adoption of the phrase "subject to a property tax levy," indicate that, at most, it was intended to exclude property of a special and limited class which the states had traditionally exempted from taxation. The Doyle Report described these categories of property in some detail. Essentially they were: (1) government-owned property; (2) exemptions "applicable to the property of various improvement organizations, fraternal societies, business or professional associations, housing projects, municipally-owned utilities, etc."; and (3) "judicial" or "charter" exemptions such as extended to railroad rights of way. S. Rep. No. 445, *supra* p. 16, at 452. There is no reference to the kind of blanket exclusions from taxation such as later adopted by South Dakota. Indeed, from all that appears, such exclusions were unknown at the time the phrase found its way into pending bills.[28] Viewed

[28] On several occasions, testimony was presented to the Senate Commerce Committee on the extent of discriminatory taxation by the states. Among the examples listed, none showed sweeping tax exemptions for non-carrier business property. *See, e.g.*, S. Rep. No. 1483, *supra* note 14, at 4; S. Rep. No. 630, *supra* p. 17, at 5.

in this context, use of the phrase "subject to a property tax levy" to exclude *limited classes* of traditionally exempt property from the comparison class achieved a rational purpose which was also consistent with the basic purpose of the statute.[29]

This view is supported by the approach taken when the proposed legislation was enlarged in the 90th Congress to prohibit discriminatory tax rates as well as discriminatory assessments. The National Association of Tax Administrators, an opponent of the proposed § 306, argued that the legislation "would restrict the power of State Legislatures to classify property in order to carry out State policies such as provision for better land use, encouragement of location of industry, homestead tax relief and old-age property tax relief." S. Rep. No. 1483, *supra* note 14, at 8; S. Rep. No. 630, *supra* p. 17, at 8. As noted above, the resulting Senate Report made clear that, in determining whether tax rates were discriminatory, property traditionally classified as exempt "such as churches, charitable institutions, homesteads, and the

[29] For this reason, appellants question the correctness of the holding in ACF Industries, Inc. v. State of Arizona, 714 F.2d 93 (9th Cir. 1983), that business inventories exempted from *ad valorem* taxation may be excluded in calculating the average assessment required by 306 to be applied to railroad property. In many states, business inventories compose a large portion of the personal property tax base, and their exclusion from the comparison class would create significant discrimination against the property of interstate carriers.

like" was not intended to be considered as part of the comparison class. S. Rep. No. 630, *supra* p. 17, at 11.

The legislative history thus leads to the conclusion that both the assessment and tax rate provisions of bills proposed prior to the 4-R Act were intended to exclude from the comparison class only those special and limited classes of property which the states had traditionally exempted. Since the objective in both provisions was the same, the revision of the legislation during consideration of the 4-R Act to transfer the term "subject to a property tax levy", from the assessment provision to a definitional provision made sense.

Certainly that change cannot have been intended to create, suddenly and in the absence of any supporting legislative history, a major exception to the prohibition on discriminatory rates. Such an intent would not only have been at odds with the agreed purpose of the legislation, but would be totally inexplicable in light of the fact that Congress at the same time rejected the one limited exception which the Senate bill would have created, namely to allow for discrimination under state constitutional provisions.[30]

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[30] The Eighth Circuit in *Ogilvie* noted with regard to the 4-R Act: "Congress excluded agricultural property from the definition of commercial and industrial property, and could have excluded from the definition centrally assessed property or utilities or any other property it so desired. The fact is that it did not." Ogilvie v. Bd. of Equalization, 657 F.2d 204, 205 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). *See also* the court's conclusion in Atchison, T. & S. F. Ry. Co. v. Arizona, 559 F. Supp. 1237, 1246-47 (D. Ariz. 1983), that leased residential property should be included as commercial and industrial property

Differences between the rail and air carrier provisions: The foregoing conclusion is not altered by minor differences in language between § 1513(d) and § 306. The absence from § 1513(d) of the "catchall" provision found in § 306, prohibiting "any other [state] tax which results in discriminatory treatment of a common carrier by railroad" (49 U.S.C. § 11503(b)(4)), offers no support for the result reached by the South Dakota Supreme Court.[31] This catchall provision was not aimed at property taxes at all; the drafters and supporters of § 306 believed that the legislation prohibited all forms of property tax discrimination even before the catchall provision was added to the bill.[32]

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for comparison purposes:

> "A broad interpretation [of 'commercial and industrial property'] that focuses on the owner's use of the property is more consistent with the Congress' clear intent to measure discriminatory taxation and provide appropriate relief .... The 4-R Act is an attempt to establish uniformity between the tax rates of railroads and the 'hypothetical average taxpayer' .... *This intent to measure one taxpayer's burden against another applies equally to determine which taxpayers the railroads should be measured against. In this case, the proper taxpayers are those who use their property commercially as the railroads do.*" (Emphasis added.)

[31] The district court's reliance in *Ogilvie v. State Bd. of Equalization*, 492 F.Supp. 446 (D.N.D.), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 464 U.S. 1086 (1980), on the catchall provision seems not have been followed by the Eighth Circuit. *See supra* p. 26, n. 30. *But see* Trailer Train Co., v. State Bd. of Equalization, 710 F.2d 468, 472 (8th Cir. 1983), and Burlington N. R.R. Co. v. Bair, 766 F.2d 1222 (8th Cir. 1985).

[32] *Railroads—1975: Hearings Before the SubComm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1837 (1975) (testimony of Stephen Ailes, President, Association of American Railroads).

The language was inserted only "three weeks before the statute's passage" and "represented a last minute realization by Congress that prohibiting only discriminatory property taxes would not be enough relief." *Richmond, F. & P. R.R. Co. v. Dep't of Taxation*, 762 F.2d 375, 380 (4th Cir. 1985). The provision instead was aimed at other taxes, such as a local gross receipts tax being imposed on the New York Dock Railway.[33] By contrast, § 1513(a), enacted prior to § 1513(d), already prohibited any state tax whatsoever on an airline's gross receipts.[34] *Aloha*, 464 U.S. at 10.[35]

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[33] *Id.* at 1883 (testimony of Stuart H. Johnson, Jr., Counsel for the New York Dock Railway).

[34] In addition, a catchall provision would have been inconsistent with § 1513(d)(3), which creates a limited exception from the statute for "in lieu" taxes "wholly utilized for airport and aeronautical purposes." The South Dakota court correctly rejected the state's argument that the flight property tax fell within that exception.

[35] Another minor difference between the statutes is the presence of the words "of the same type" in § 1513(d)(1)(A). The legislative history of § 1513(d) does not explain the origin of these words. It appears likely, however, that they were inserted to assure that taxation comparisons be made between like categories of property, *i.e.*, real with real, and personal with personal—a result already reached by the courts in applying the Motor Carrier Act. *See* Arkansas-Best Freight System, Inc. v. Lynch, 723 F.2d 365 (4th Cir. 1983); *see also* Arkansas-Best Freight System, Inc. v. Tax Div., Nos. 85-1368-69, slip op. at 9 (8th Cir. March 17, 1986) (available on LEXIS, Genfed library, Courts file). In any event, the meaning of the words is not in dispute in this proceeding.

CONCLUSION

For the foregoing reasons, the tax imposed by South Dakota on the flight property of airlines in interstate commerce violates § 7(d) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513(d). The judgment of the Supreme Court of South Dakota sustaining that tax must, therefore, be reversed.

Respectfully submitted,

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April 30, 1986

APPENDIX

APPENDIX A

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "Assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

B. Pertinent portions of Title 10, South Dakota Codified Laws provide:

10-4-6.1 Exemption from taxation of personal property not centrally assessed—Taxes or fees in lieu unimpaired. Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.

10-6-33. Basis for determining valuation for tax purposes—Forced sale value not to be used. All property shall be assessed at its true and full value in money but not more than sixty percent of such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made and applied and the taxes computed. * * *

10-6-34.1 Centrally assessed property classified Percentage of value at which equalized. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and

personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized at the same percentage as other real property in the county.

10-29-2. Department of revenue to assess flight property. Flight property of airline companies operating in this state shall be assessed by the department of revenue and not otherwise.

10-29-8. Annual assessment of flight property Information considered—Addition of omitted property. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may add any property omitted from the return of such companies.

C. The Supremacy Clause of the United States Constitution (Art. VI, Clause 2) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX B

Determination of Tax Levied on Western Air Lines, Inc. for 1983*

Form 500—SECRETARY OF REVENUE

STATE OF SOUTH DAKOTA DEPARTMENT OF REVENUE

Secretary of Revenue

Capitol Lake Plaza Building Pierre, South Dakota
To be filed on or before June 1st.

ANNUAL REPORT

of

COMMERCIAL AIRLINE FLIGHT PROPERTY

Pursuant to South Dakota Statutes, SDCL 10-29 Commercial Air Flight Property Taxes are levied on or before the Fifth day of July. Notice of Assessment is sent the Company by the following July 20. The tax is payable January 1st following the levy and becomes delinquent May 1st next. Failure to send or receive the notice herein provided for or error in such notice shall not excuse the payment of the tax as required by this act.

* From Appendices A, B, & C to the Defendants' Brief to the South Dakota circuit court for the Sixth Judicial Circuit.

REPORT PERIOD FOR YEAR ENDING December 31st, 1982

Western Air Lines, Inc. Company	6060 Avion Drive Los Angeles, CA 90045 Address
Incorporated in State of Delaware	Date Company's Operation Began In South Dakota April 9, 1952

AFFILIATED OR CONTROLLING CORPORATION

Name	Address
None	Western Air Lines, Inc. P.O. Box 92005, WWPC Los Angeles, CA 90009

Tax Agent David L. Heiss, Mgr. Prop. Taxes Name
Los Angeles, CA 90009 Address

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982

Schedule 504-A
Page 1 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 727-200	(L) N2801W	10-16-69	Same as Col. (3)	$7,226,128	33.33%	$2,408,468
"	(L) N2802W	10-16-69	"	7,262,787	33.33%	2,420,687
"	(L) N2803W	10-16-69	"	7,223,054	33.33%	2,407,444
"	(L) N2804W	11-14-69	"	7,213,236	33.33%	2,404,172
"	(L) N2805W	11-14-69	"	7,292,855	33.33%	2,430,709
"	(L) N2806W	11-14-69	"	7,242,961	33.33%	2,414,079
"	(O) N2807W	5-12-72	"	8,186,625	33.33%	2,728,602
"	(O) N2808W	6-13-72	"	8,212,546	33.33%	2,737,242
"	(O) N2809W	6-16-72	"	8,270,894	33.33%	2,756,689
"	(O) N2810W	8-04-72	"	8,216,156	33.33%	2,738,445
"	(O) N2811W	8-16-72	"	8,227,530	33.33%	2,742,236
"	(O) N2812W	3-29-74	"	8,247,683	33.33%	2,748,953
"	(O) N2813W	4-06-74	"	8,246,670	33.33%	2,748,615
"	(O) N2814W	4-26-74	"	8,237,120	33.33%	2,745,432
"	(O) N2815W	5-29-74	"	8,239,603	33.33%	2,746,260
"	(O) N2816W	5-24-74	"	8,245,448	33.33%	2,748,208
"	(O) N2817W	6-05-74	"	8,359,635	33.33%	2,786,266
"	(O) N2818W	7-25-74	"	8,224,163	33.33%	2,741,114
"	(O) N2819W	5-23-75	"	8,554,285	33.33%	2,851,143
"	(O) N2820W	5-29-75	"	8,560,963	33.33%	2,853,369
"	(O) N2821W	6-02-75	"	8,561,097	33.33%	2,853,414

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982
(Continued)

Schedule 504-A
Page 1 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Pecent Good*	Depereciated Cost
Boeing 727-200	(L) N2822W	3-09-77	"	10,771,037	46.67%	5,026,843
"	(L) N2823W	3-09-77	"	10,752,752	46.67%	5,018,309
"	(L) N2824W	3-29-77	"	10,767,711	46.67%	5,025,291
"	(L) N2825W	5-03-77	"	10,755,269	46.67%	5,019,484
"	(L) N2826W	5-24-77	"	10,750,904	46.67%	5,017,447
"	(O) N2827W	12-15-77	"	10,620,878	46.67%	4,956,764
"	(O) N2828W	12-21-77	"	10,569,635	46.67%	4,932,849
"	(O) N2829W	6-20-78	"	11,371,652	53.33%	6,064,502
"	(O) N830WA	5-09-78	"	11,440,363	53.33%	6,101,146
"	(O) N831WA	5-31-78	"	11,356,714	53.33%	6,056,536
"	(O) N282WA	7-12-78	"	11,428,096	53.33%	6,094,604
"	(O) N283WA	7-13-78	"	11,425,185	53.33%	6,093,051
"	(O) N284WA	4-24-79	"	12,717,894	60.00%	7,630,736
"	(O) N286WA	5-01-79	"	12,711,253	60.00%	7,626,752
"	(O) N287WA	5-29-79	"	12,709,549	60.00%	7,625,729
"	(O) N288WA	6-07-79	"	12,713,031	60.00%	7,627,819
"	(O) N289WA	6-19-79	"	12,722,058	60.00%	7,633,235
"	(L) N831L	7-27-79	"	13,121,466	60.00%	7,872,880
"	(O) N290WA	3-05-80	"	12,739,055	66.67%	8,493,128
"	(O) N291WA	3-11-80	"	12,758,443	66.67%	8,506,054

*From Schedule 504B

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982

Schedule 504-A
Page 2 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 727-200	(O) N292WA	5-06-80	Same as Col. (3)	$ 13,184,977	66.67%	$ 8,790,424
"	(O) N293WA	5-09-80	"	13,185,770	66.67%	8,790,953
"	(O) N294WA	5-19-80	"	13,185,770	66.67%	8,790,953
"	(L) N295WA	5-29-81	"	15,707,466	73.33%	11,518,285
"	(L) N296WA	6-05-81	"	15,726,494	73.33%	11,532,238
"	(O) N297WA	5-22-81	"	14,223,095	73.33%	10,429,796
Total	727-200			$487,467,956		$244,287,355
Boeing 737-200	(O) N4502W	7-01-68	Same as Col. (3)	$ 3,686,838	33.33%	1,228,823
"	(O) N4505W	7-22-68	"	3,692,703	33.33%	1,230,778
"	(O) N4507W	8-16-68	"	3,481,028	33.33%	1,160,227
"	(O) N4509W	9-09-68	"	3,683,521	33.33%	1,227,718
"	(O) N4511W	9-30-68	"	3,699,435	33.33%	1,233,022
"	(O) N4512W	10-16-68	"	3,701,920	33.33%	1,233,850
"	(L) N4513W	10-18-68	"	3,692,953	33.33%	1,230,861
"	(L) N4514W	11-07-68	"	3,727,080	33.33%	1,242,236
"	(O) N4516W	12-09-68	"	3,705,474	33.33%	1,235,034
"	(O) N4518W	1-28-69	"	3,704,843	33.33%	1,234,824

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982
(Continued)

Schedule 504-A
Page 2 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 737-200	1-28-69	"	3,704,843	33.33%	1,234,824	
"	(O) N4520W	2-25-69	"	3,709,937	33.33%	1,236,522
"	(O) N4521W	2-22-69	"	3,728,851	33.33%	1,242,826
"	(L) N4569M	12-30-82	"	13,904,000	80.00%	11,123,200
"	(L) N4571M	12-30-82	"	15,000,000	80.00%	12,000,000
Total	737-200			$ 73,118,583		$ 37,859,921
Douglas DC-10-10	(O) N901WA	4-19-73	Same as Col. (3)	$ 22,042,377	33.33%	$ 7,346,724
"	(L) N902WA	6-12-73	"	21,043,127	33.33%	7,013,674
"	(L) N906WA	6-03-75	"	23,365,607	33.33%	7,787,757
"	(L) N907WA	6-22-76	"	26,286,147	40.00%	10,514,459
"	(O) N908WA	3-03-78	"	29,624,088	53.33%	15,798,526
"	(O) N909WA	5-18-78	"	29,874,487	53.33%	15,932,064
"	(O) N912WA	7-19-79	"	32,505,103	60.00%	19,503,062
"	(O) N913WA	7-26-79	"	33,556,195	60.00%	20,133,717
"	(O) N914WA	5-12-80	"	34,809,640	66.67%	23,207,587
"	(O) N915WA	6-05-80	"	34,808,300	66.67%	23,206,694
Total	DC-10-10			$287,915,071		$150,444,264
Douglas DC-10-30	(L) N821L	1-19-74	4-14-81	22,952,000	33.33%	$ 7,649,902
Total	All Aircraft			$871,453,610		$440,241,442

*From Schedule 504B

WESTERN AIR LINES, INC.
South Dakota Flight Property Report
Depreciation Table
December 31, 1982

Year of Acquisition	Age in Years	Schedule 504-B Percent Good
1982	1	80.00%
1981	2	73.33%
1980	3	66.67%
1979	4	60.00%
1978	5	53.33%
1977	6	46.67%
1976	7	40.00%
1975 & Prior	8	33.33%

Used for computing depreciated cost of aircraft as reported on Schedule 504-A.

Western Air Lines, Inc. **OPERATING STATISTICS** **December 31, 1982**

	Type of Equipment			
	Douglas DC-10-30	Douglas DC-10-10	Boeing 727-200	Boeing 737-200
SYSTEM				
Originating & Terminating Tonnage				
Passenger	27,043	222,579	1,142,091	296,503
Express	1,934	2,346	3,282	436
Freight	15,819	61,676	58,080	4,829
TOTAL	44,796	286,601	1,203,453	301,768
Airplane Hours In Flight	2,878	32,008	137,386	29,965
Revenue Ton Miles				
Passenger	20,607,522	271,803,018	516,585,588	80,262,551
Mail	2,066,987	9,218,045	23,716,611	1,803,598
Express	1,580,916	2,099,906	2,030,979	138,042
Freight	13,835,056	68,602,689	29,484,884	1,481,530
TOTAL	38,090,481	351,723,658	571,818,062	83,685,721
SOUTH DAKOTA				
Originating & Terminating Tonnage				
Passenger	-	-	2,859	21,874
Express	-	-	7	58
Freight	-	-	53	583
TOTAL	-	-	2,919	22,515
Airplane Hours In Flight	-	-	112	1,800
Revenue Ton Miles				
Passenger	-	-	520,887	4,494,612
Mail	-	-	7,820	131,733
Express	-	-	2,303	12,354
Freight	-	-	13,653	137,407
TOTAL	-	-	544,663	4,776,106

OPERATING STATISTICS
(Continued)

December 31, 1982

PERCENTAGE OF SYSTEM	Type of Equipment: Douglas DC-10-30	Douglas DC-10-10	Boeing 727-200	Boeing 737-200
Originating & Terminating Tonnage				
Passenger				
Express				
Freight				
TOTAL				
Airplane Hours In Flight	-	-	0.242%	7.461%
Revenue Ton Miles	-	-	0.082%	6.007%
Passenger				
Mail				
Express				
Freight				
TOTAL				
TOTAL PERCENT	-	-	0.095%	5.707%
AVERAGE PERCENT	-	-	0.419%	19.175%
	-	-	0.140%	6.392%

Western Air Lines
December 31, 1982

1983 South Dakota Flight Property Tax Return
Originating and Terminating Tonnage South Dakota
Year Ended December 31, 1982

Schedule 506

	Passenger	Freight	Express	Total	Per Cent
Pierre (Hughes)	4,219	100	7	4,326	17.009%
Rapid City (Pennington)	6,767	299	23	7,089	27.872%
Sioux Falls (Minnehaha)	13,747	237	35	14,019	55.119%
Total South Dakota	24,733	636	65	25,434	100.000%

1983-Western Airlines Inc.-1983

		Original Cost Cost	Depreciated Cost	Allocation Factor	Full & True Value
B 727-200		487,467,956	244,287,355	.00140	342,002
B 737-200		73,118,583	37,859,921	.06392	2,420,006
					2,762,008

		B 727-200		B 737-200	
Tonnage	S.D.	2,919	.242	22,515	72461
	System	1,203,453		301,768	
Hours	S.D.	112	.082	1,800	6.007
	System	137,386		29,965	
Rev. Ton Miles	S.D.	544,663	.095	4,776,106	5.707
	System	571,818,062		83,685,721	
Total of three factors			.419		19.175
Average of three factors			.140		6.392

County	Allocation Factor	Full & True Value
Hughes	17.009	469,790
Pennington	27.872	769,827
Minnehaha	55.119	1,522,391
		2,762,008

A-14

COMPANY	TRUE & FULL VALUE	TAXABLE	AVERAGE MILL RATE	TOTAL TAX
FRONTIER	1,579,442.00	740,758.00	54.35	40,260.20
CONTINENTAL	160,000.00	96,000.00	54.35	5,217.60
REPUBLIC	1,627,161.00	856,048.00	54.35	46,526.21
UNITED	131,262.00	78,757.00	54.35	4,280.44
OZARK	449,123.00	269,474.90	54.35	14,645.91
WESABA	210,557.00	104,014.00	54.35	5,653.16
WESTERN	2,762,008.00	1,432,772.00	54.35	77,871.16
TOTALS	6,919,553.00	3,577,823.00	54.35	194,454.68

A-15

COMPANY		LOCATION OF AIRPORT	ALLOC % TAX	25%	75%	TOTAL TAX
FRONTIER		Rapid City	65.5%	5,032.52	19,777.83	24,810.35
		Sioux Falls	34.5%	5,032.52	10,417.33	15,449.85
	TOTALS		100.0%	10,065.04	30,195.16	40,260.20
REPUBLIC		Aberdeen	17.37%	2,326.31	6,061.20	8,387.51
		Rapid City	19.62%	2,326.31	6,846.33	9,172.64
		Sioux Falls	55.75%	2,326.31	19,453.77	21,780.08
		Watertown	6.73%	2,326.31	2,348.41	4,674.72
		Yankton	0.53%	2,326.31	184.95	2,511.26
	TOTALS		100.00%	11,631.55	34,894.66	46,526.21
WESTERN		Pierre	17.01%	6,489.26	9,934.42	16,423.68
		Rapid City	27.87%	6,489.26	16,277.02	22,766.28
		Sioux Falls	55.12%	6,489.26	32,191.94	38,681.20
	TOTALS		100.0%	19,467.78	58,403.38	77,871.16
MESABA		Brookings	32.14%	471.10	1,362.69	1,833.79
		Huron	47.10%	471.10	1,996.97	2,468.07
		Mitchell	20.76%	471.10	880.20	1,351.30
	TOTALS		100.00%	1,413.30	4,239.86	5,653.16
OZARK						
TOTALS		Sioux Falls	100.00%	3,661.48	10,984.43	14,645.91
CONTINENTAL	TOTALS	Rapid City	100.00%	1,304.40	3,913.20	5,217.60
UNITED	TOTALS	Sioux Falls	100.00%	1,070.11	3,210.33	4,280.44
				48,613.66	145,841.02	194,454.00

1983-County Distribution of Air Flight Property Tax-1983

COUNTY	COMPANY	AIRPORT	25%	75%	TO COMPANY 100%	TOTAL TAX
BEADLE	MESABA	Huron	471.10	1,996.97	47.10%	2,468.07
BROOKINGS	MESABA	Brookings	471.10	1,362.69	32.14%	1,833.79
BROWN	REPUBLIC	Aberdeen	2,326.31	6,061.20	17.37%	8,387.51
CODINGTON	REPUBLIC	Watertown	2,326.31	2,348.41	6.73%	4,674.72
DAVISON	MESABA	Mitchell	471.10	880.20	20.76%	1,351.30
HUGHES	WESTERN	Pierre	6,489.26	9,934.42	17.01%	16,423.68
YANKTON	REPUBLIC	Yankton	2,326.31	184.95	0.53%	2,511.26
MINNEHAHA	FRONTIER	Sioux Falls	5,032.52	10,417.33	34.50%	15,449.85
	REPUBLIC	Sioux Falls	2,326.31	19,453.77	55.75%	21,780.08
	OZARK	Sioux Falls	3,661.48	10,984.43	100.00%	14,645.91
	UNITED	Sioux Falls	1,070.11	3,210.33	100.00%	4,280.44
	WESTERN	Sioux Falls	6,489.26	32,191.94	55.12%	36,681.20
TOTAL MINNEHAHA COUNTY			18,579.68	76,257.80		94,837.48
PENNINGTON	FRONTIER	Rapid City	5,032.52	19,777.83	65.50%	24,810.35
	REPUBLIC	Rapid City	2,326.31	6,486.33	19.62%	9,172.64
	WESTERN	Rapid City	6,489.26	16,277.02	27.87%	22,766.28
	CONTINENTAL	Rapid City	1,304.40	3,913.20	100.00%	5,217.60
TOTAL PENNINGTON COUNTY			15,152.49	46,814.38		61,966.87
GRAND TOTAL			48,613.66	145,841.02		194,454.68

APPENDIX C

CHANGES IN CORPORATE AFFILIATIONS

The following changes have occurred since the appellants' corporate affiliations were listed at p. i of the Jurisdictional Statement:

a. Peoples Express Airline has completed its acquisition of Frontier Holdings, Inc., parent of appellant Frontier Airlines, Inc.

b. Appellant Republic Airlines, Inc. has agreed to be acquired by NWA, Inc., parent of Northwest Airlines, Inc.

c. Ozark Holdings, Inc., parent of appellant Ozark Air Lines, Inc., has agreed to be acquired by Trans World Airlines, Inc.

NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court
of the State of South Dakota

APPELLEES' BRIEF

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QUESTION PRESENTED

The Supreme Court of South Dakota has construed Section 1513(d)(2)(C) of Section 7(d) of the Airport Development Acceleration Act of 1973, as added by Section 532 of the Airport and Airway Improvement Act of 1982, (49 U.S.C. 1513(d)), as excluding from the definition of "commercial and industrial property", personal property devoted to a "commercial and industrial" use which is not subject to a property tax levy.

The question presented is:

Does tax discrimination of the nature proscribed by 49 U.S.C. 1513(d) result when only commercial and industrial real property in the taxing jurisdiction is assessed and personal property is made exempt from tax by state law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS

STATUTES

South Dakota Codified Laws:

South Dakota Session Laws:

OTHER REFERENCES

PARTIES TO THE PROCEEDING

Parties to the proceeding include:

The South Dakota State Bcard of Equalization, whose duty it is to equalize the assessment of airline flight property; [1]

The Boards of County Commissioners of Beadle, Brookings, Brown, Codington, Davison, Hughes, Minnehaha, Pennington, and Yankton counties of South Dakota, whose duty it is to decide questions of abatement and refund of taxes; [2] and

The County Treasurers of the same counties, whose duties it is to make refund of taxes when it has been determined that the assessment is excessive or the tax paid is illegal when paid under protest. [3]

OPINIONS BELOW

The decision of the trial court, Circuit Court of the Sixth Judicial Circuit

1 SDCL 10-29-12
2 SDCL 10-18-2.
3 SDCL 10-27-7

of South Dakota, is unreported but appears in the Appellants' Jurisdictional Statement commencing at page 13a.

On the appeal from that decision, the opinion of the South Dakota Supreme Court in the case of Western Airlines et al. v. Board of Equalization et al, is reported at 372 N.W.2d 106 (S.D. 1985).

JURISDICTION

The Appellants invoked the jurisdiction of this Court under 28 U.S.C. §1257(2) from a judgment of the Supreme Court of South Dakota the court sustained the validity of the South Dakota Flight Property Tax, South Dakota Codified Laws 10-29, based on the enactment by the Congress of the Airport and Airway Improvement Act of 1982, codified at 49 U.S.C. §1513(d) Supp. 1986.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

See Appendix A for appropriate parts of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by §532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §1513(d).

B. South Dakota Codified Laws Annotated, §§10-4-6.1; 10-6-34.1; 10-29-2; 10-29-8 (1982).

NO. 85-732

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On Appeal from the Supreme Court of the State of South Dakota

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APPELLEES' BRIEF

STATEMENT OF THE CASE

PROPERTY TAXATION IN SOUTH DAKOTA

By enactment of Chapter 28 of the Laws of 1897 the South Dakota Legislature

provided for the assessment and taxation of all real and personal property in the state. In the intervening 89 years, very little change was made in those laws and the tax collected was generally the sole source of support for local subdivisions of government. What utility property existed during that 89-year-period was assessed originally on behalf of the local units of government by first the State Board of Equalization and more recently by the Department of Revenue, South Dakota Codified Laws 10-28 through 10-38.

CENTRALLY ASSESSED OPERATING PROPERTY

As with most so-called "centrally assessed properties" it was the operating property of the system that was assessed as a whole unit. The local assessors only valued whatever non-operating property might be within their particular taxing jurisdiction. This was equally true with the airline

industry in the state prior to 1961. Whatever was owned and used in the state on the legal assessment day [4] was valued for tax purposes by the local assessor. As late as 1960 a committee of the South Dakota

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[4] Property generally in South Dakota valued and assessed as of January 1, SDCL 10-6-2 - utilities and carriers have various assessment dates so far as material here, airlines are assessed as of July 5 of each year.

[5] The Committee recommends that the Legislature make no change at this time regarding the refund of a portion of the aviation fuel tax, and that no flight property tax be adopted, but recommends continued study of the subject as the aviation industry develops in the state.

Because the aviation industry is in its infancy in South Dakota, and because further taxation on the operations of the airlines would tend to stifle its development, the Committee agreed that it would be unwise to impose any additional tax at this time. Therefore, both the proposals studied by the Subcommittee on Public Utilities - elimination of the graduated gas tax refund and the adoption of a flight property tax - are rejected for the present. However, the Committee does not believe that further study into these questions is necessary, and recommends that the Legislature, through its interim committee, continue to give consideration to the proposals.

Fifth Biennial Report

State Legislative Research Council

Vol 1 Pg 109

September, 1960

Legislature recommended [5] that no change be made regarding the refund of a portion of aviation fuel tax and that no flight property tax be adopted. The Legislature also sought the continued study of the subject as the aviation industry developed in the state. However, in 1961 the Legislature considered and adopted a law providing for an airline flight property tax. [6, 7]

FLIGHT PROPERTY TAX ON AIRLINES

A property tax was imposed on the flight property of airline companies operating in the state. The property was to be assessed by the Department of Revenue and no

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6 HB 712, 1961 Legislative Session. See Appendix for appropriate sections.

7 1961 was the same year that the first anti-discrimination tax legislation was introduced in Congress, HR 7497, making unlawful and an undue burden upon interstate commerce certain property tax assessments of common carrier property.

other local assessment was permitted. [8] The assessment was based on the use in the state of air flight property and combined the ratio of passengers, express and freight received in the state and discharged in the state compared to the total tonnage within and without the state; the ratio of flight time of aircraft of the airline company to the total flight time within and without the state and, finally, the ratio of revenue ton miles of passengers, mail, express and freight by the company flown within the state compared to the total within and without the state for the preceding calendar year.

After the assessment by the Commissioner of Revenue, now the Secretary of Revenue, the State Board of Equalization was required to equalize the assessment whereupon

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8 Ch. 449, Laws of 1961 Codified as South Dakota Codified Laws 10-29

the Commissioner of Revenue would compute the tax and average mill rate of all property within the state.[9] The tax then imposed would be allocated to airports where the airline companies made regularly scheduled landings. The tax was required to be used exclusively by such airports for airport purposes. [10] A minor amendment in 1968 changed the method of determining the average mill rate of the property. The law restricted the average to the valuation of property within municipalities operating an airport, rather than the average mill rate in the entire state. [11] Later, in 1970, the South Dakota Legislature changed the law again and the state went back to an average mill rate of all property [12]

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9 SDCL 10-29-14
10 SDCL 10-29-15
11 Ch. 262, Laws of 1968
12 Chapter 72, Laws of 1970, HB 849, SDCL 10-29-14

BASIS OF ASSESSMENT

The Constitution of South Dakota requires that taxes be uniform on all property of the same class. [13] To implement that provision, South Dakota law provides that property whether centrally or locally assessed be assessed at its full and true value. [14] There has been difficulty in the enforcement of this statute. In a number of cases, the courts of the state were called upon to equalize unequal assessments. In 1957 the Legislature, while still directing that all property should be assessed at its full and true value in money, determined that not more than sixty percent of assessed or full and true value should be considered as the taxable value of property on which to levy and compute taxes. [15] The state sales

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13 Article XI, section 2, South Dakota Constitution
14 SDCL 10-6-33
15 Ch. 459, Laws of 1957, SDCL 10-6-33

ratio study, which was produced each year by the State Revenue Department, showed that practices by local assessors varied across the state.

STATE USE OF PERCENTAGE ASSESSMENT

In assessing utility and railroad property, however, the state did not use the statutory sixty percent factor. In 1962, in a series of court cases brought by railroads and utilities, the South Dakota Supreme Court held that centrally assessed property must be given the benefit of any valuation formula which was applied to the advantage of locally assessed property.

CONGRESSIONAL HISTORY ON TAX DISCRIMINATION LAWS

The Act in question here and the reason for its adoption is tied to a series of proposals before Congress. These proposals ultimately brought about the 4-R Act in respect to railroad taxation.

In 1944, Congress received a report alleging discrimination against railroads in property taxtion, but no action was taken. Although reference was occasionaly made to this report in later congressional hearings, the legislative history of tax anti-discrimination laws can be said to start with submission of the Doyle Report in 1961. [16] The Doyle Report is a comprehensive study of transportation policies in the United States made by a special study group headed by General Doyle and submitted to the Senate Committee on Commerce. One chapter of the report deals with discriminatory taxation of railroad property. Prominently featured in this report is a table, submitted by the Association of American Railroads, showing

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16 National Transportation Policy, a report prepared by the Special Study Group on Transportation Policies in the United States for the Senate Committee on Interstate and Foreign Commerce, 87th Congress, 1st Session (preliminary draft 1961)

the overpayment of property taxes. This overpayment resulted from assessing of railroads at a higher percent than the percent at which other property is assessed. The Doyle Report points out that federal anti-injunction provisions (28 U.S.C. Section 1341) prevent federal courts from taking jurisdiction in tax assessment cases unless it can be proved that a plain, speedy and efficient remedy does not exist under state law. The authors of the report state that with respect to taxation, Congress has not utilized its powers to regulate interstate commerce. As a result, the role of policymaker in this area has been left to the Supreme Court.

The Doyle Report is concerned with the entire transportation system, and especially with competitive relationships within the transportation industry. It noted that railroads and pipelines are more heavily taxed than motor, air or water carriers, mostly because of state and local taxes on right-of-way property. The special study group recommended that railroads and pipelines be exempted from property taxation, with the exemption being phased in over a ten-year period in order to permit tax jurisdictions to adjust to the tax loss.

As an additional or alternative proposal, the special committee also mentioned a proposal offered by the Association of American Railroads declaring the following actions by a governmental subdivision or agency unlawful:

(a) the asessment, for purposes of the property tax levied by any taxing district, of property owned or used by any common carrier engaged in interstate commerce, at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the

taxing district subject to the same property tax levy bears to the true market value of all such property, and (b) the collection of any tax on the portion of said assessment declared to be unlawful.

It was the alternative proposal, rather than the exemption of right-of-way proposal, that became the basis of legislative activity. The first hearing on the proposal was by the Subcommittee on Transportation and Aeronautics of the House Committee of Interstate and Foreign Commerce, in 1964. [17] No actions were taken in 1964 by the committee, and hearings were held by the same committee in 1966. [18] Again the bill was not reported. In 1966, action shifted to the

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17 Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Congress, 2d Session on HR 736 and HR 10169, 1964.

18 Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Congress, 2d Session, on HR 4972, 1966.

Senate, where hearings were held by the Subcommittee on Surface Transportation of the Senate Committee on Commerce, and a bill was favorably reported the following year. [19]

The full Senate took no action, and hearings were held again in 1969. [20] Again the bill was reported favorably, and on January 30, 1970, the Senate passed S.927 by voice vote. This bill was an amended version of the Association of American Railroads' proposal.

With respect to testimony on S. 927, the South Dakota Department of Revenue filed a written statement with the Committee. [21] It concluded that the matter of discrimination was grossly exaggerated.

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19 S. 927, 90th Congress, 1st Session (1967)

20 Committee on Commerce United States Senate, 91st Congress, 1st Session S. 2289

21 Hearings on Surface Transportation of the Committee on Commerce United States Senate, Ninetieth Congress, 1st Session on S. 927 pg. 139.

Although a bill was reported by the Senate committee in 1972, no other bill passed either the House or Senate until Section 306 was passed as part of the 4-R Act [22] in 1976. The 4-R Act is a long piece of legislation dealing with problems of railroads brought to public attention by the bankruptcy or near bankruptcy of several railroads. No hearings were held on Section 306, and it was adopted with little discussion or debate. Section 306 is somewhat longer than the earlier bills, and some of the language reflects objections raised during hearings.

Section 306 was originally codified at 49 U.S.C. Section 26c, but before the effective date Congress recodified that section as part of the revision of the Interstate Commerce Act. The section is now codified at

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22 Railroad Revitalization and Regulatory Reform Act of 1976

49 U.S.C. Section 11502. The recodification substantially changed Section 306. Most of the courts which have considered the issue have taken the position that because the legislative purpose of the recodification was to restate the law without substantive change, the original version of Section 306 should be followed.

OTHER ENACTMENTS AGAINST DISCRIMINATION

Subsequent to that enactment but with a similar avowed purpose, the Motor Carrier Act of 1980 was passed. [23] A third enactment in 1982, [24] is the law now before the Court. It is a part of the Airport and Airway Improvement Act of 1982 (codified as 49 U.S.C. Section 1513(d)) and prohibits certain burdensome and discriminatory acts against air carrier transporation property.

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23 Public Law 97-261, Section 31A, 94 Stat. 823, codified 49 U.S.C. Section 11503 (Supp. 1985)

24 Public Law 97-238

SOUTH DAKOTA AIRLINES FILE PROTESTS

This background of South Dakota's property tax and litigation history and Congress's history in enacting anti-discriminatory legislation brings this case to May of 1983, when Appellants paid under protest taxes levied for the first six months of that year. Appellants thereafter sued in the appropriate counties for a refund. In addition, in order to counter the centrally assessed valuation of their property, Appellants appealed from the Department of Revenue to the State Board of Equalization and from there to the Circuit and Supreme Courts of South Dakota.

The state alleged that the "in lieu of" tax provisions of 49 U.S.C. 11513(d)(3) were what saved the tax. The Circuit Court determined that the tax was an "in lieu" tax and therefore not discriminatory nor subject to the Airport Development Acceleration Act.

On appeal, the South Dakota Supreme Court decided that the tax was not "in lieu of" other property taxes but rather, because of differences in the language between the Airport Development Acceleration Act and the Regulatory Railroad Revitalization and Reform Act of 1976, found that "commercial and industrial property," as defined in 49 U.S.C. 1513(d), only included property subject to a tax levy. Thus the airlines could not challenge their valuation or taxes based on a comparison of the treatment of tax-exempt taxpayers with the Appellants.

In a 4-to-1 decision the five member South Dakota Supreme Court held that the term "commercial and industrial" property as used in subdivisions (A) and (C) of 49 U.S.C. §1513(d)(1) means

> Property, other than transportation property and land used for agricultural purposes or timber growing, devoted

> to a commercial or industrial use and subject to a property tax levy. The locally assessed personal property, being exempt from personal property tax levy cannot be included as commercial or industrial property for comparison either (A) or (C).

It noted with approval at 245 a federal case in Arizona [25] holding that "property which is for any reason tax exempt is excluded as a form of commercial and industrial property."

The South Dakota Supreme Court further based its holding on the Eighth Circuit Court of Appeals decision in Ogilvie v. State Board of Equalization [26] The South Dakota court found that the fourth form of prohibited taxation, i.e. "any other tax" which was present and used as the grounds in

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25 Atchinson, Topeka & Santa Fe Railroad v. State of Arizona, 559 F.Supp. 1237(D. AZ 1983)

26 657 F.2d 204 (Eighth Circuit) cert. denied 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed. 621 (1981)

Ogilvie for its decision in that North Dakota railroad case, was not present in the Airline Improvement Act. Therefore the same reasoning did not apply to taxation of this class of property when personal property in the state was not taxed.

SUMMARY OF ARGUMENT

Congress did not intend that all property should be taken into consideration when determining whether or not airline property was being discriminated against. Testimony by representatives of the carrier industries argued for the broader scope, but the original piece of legislation, which has been followed in all subsequent tax anti-discrimination legislation, only requires that commercial and industrial property which is subject to a tax levy shall be compared to see if discrimination exists.

To remove from the South Dakota tax rolls first household goods and personal

effects and a year later other personal property, including business inventories, does not discriminate against airlines whose property is assessed and taxed on a use formula basis with the proceeds only used for airport purposes.

The South Dakota Supreme Court has consistently held that utility property is entitled to be assessed and taxed as is other property. This treatment takes place without any reference to Federal legislation.

The South Dakota Supreme Court as well as several Federal lower courts have correctly interpreted commercial and industrial property as that property used for commercial and industrial purposes which is subject to a tax levy.

ARGUMENT

The Appellants assert that the South Dakota Supreme Court did not properly examine the purposes of the Congress in

enacting tax anti-discrimination legislation. On the contrary, as will be demonstrated, the Congress changed its mind and gave the states more leeway when assessing property than the common carrier industry desired. Appellants have attempted to inject ambiguity where none exists in the law in question.

Congress identified specifically the forms of discrimination it intended to prohibit in its Anti Tax Discrimination Acts.

There can be no question that the Act in question here, as well as other related types of acts commencing with the 4-R Act, were passed to prevent discrimination in taxation. The common carrier and utility industries, over a long period of time, were able to document this before Congress. These were, generally speaking, in the area of property or advalorem taxation.

It is the position of the Appellees that Congress did not prohibit every form of discrimination, but rather defined the type of discrimination and the degree of discrimination which was proscribed.

For example, with respect to rail and motor carrier transportation property, grounds for court intervention include a avariable factor of five percent of the ratio of the assessed value to the true market value when compared with other commercial industrial property in the same assessment jurisdiction.

A similar comparative percentage does not appear in the Air Carrier Transportation Property Tax Law.[27] There the tax process is actionable if the property is assessed at any higher ratio of true market value than the ratio of other commercial industrial property of the same type.

27 49 U.S.C. 1513(d)

By the same token, railroads may not be discriminated against on the basis of four specified conditions: 1) the assessment at a value higher than other commercial industrial property, 2) the collection of a tax on that assessment, 3) the collection of the tax on a different rate than that applicable to commercial industrial property in the same jurisdiction or 4) any other tax that discriminates against rail carrier transportation property.

The law, with respect to motor carriers and airlines, contains the first three types of acts which are prohibited, but does not contain the fourth or potential catch-all tax freeze. It was that recognition by the South Dakota Supreme Court in this case that stands out in applying the federal decision in Ogilvie v. State Board of Equalization 492 (N.D. aff'd) 657 F.2d 202 (8th Cir.)

cert. denied 454 U.S. 1086 (1981). The Eighth Circuit Court of Appeals at page 210 said,

> As noted on our review of the history of this section (49 U.S.C. (11503(b)(4)) its purpose was to prevent tax discrimination against railroads in any form whatsoever.

North Dakota in Ogilvie had strenuously argued that personal property should not be considered as commercial and industrial property since it was not subject to a property tax levy in North Dakota. The Court points out that the catch-all section clearly eliminates that argument. The same catch-all phrase is not found in the either the Motor Carrier or the Air Carrier Tax statutes.

From all the hearings held it is plain that committees of Congress understood the discrimination that was involved and

appropriately worded the statute to do away with the most onerous. Appellants and Amici argue that an absurd result is reached when South Dakota may totally exempt one type of property but may not vary the comparable tax levy rate or ratio concerning the same property. This argument overlooks and avoids the basic proposition concerning taxes that when you are dealing with ratios of assessed value or rates of levy, you are dealing with property which is being taxed. Obviously if you have exempt property, whether it is a church, a state office building, or a merchant's business inventory which is exempt, you are not planning to tax that property. Therefore there is no ratio and there is no rate of tax and the same tests and standards do not apply.

Congress could have developed other logical bases of comparative discrimination. For example, it could have declared that a

tax that was not used to support the particular business being taxed would be discriminatory. Likewise, a tax which took a greater portion of the taxpayer's gross or net income than income derived from other property or an assessment which resulted in more than the unit valuation of the entire system would be discriminatory. Congress did not choose these approaches, however. It chose to define and limit the burdensome and discriminatory acts by the plain and unambiguous language used in the law.

LANGUAGE CHANGED FROM ORIGINAL ACTS PROPOSED

Earlier proposed versions of the laws in question required comparison with "all other property" as opposed to the final enactments which zeroed in on certain commercial and industrial property.

Appellants contend that the meaning of the term "all other property" in early versions of the law has not been changed by

the more definitive use of language as "commercial and industrial" property. Senate Report 91-630, Discriminatory State Taxation of Interstate Carriers at page 11, in an analysis of S-2289, contains this language:

> The phrase 'any other property in the taxing district' is not intended to interfere or restrict state action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like. In other words, property totally or partially exempt is not intended to be taken as a measure of 'any other property' for tax purposes.

Obviously Congress had problems with the term "all other property." See, for example, the testimony contained in the reported hearings of the Subcommittee on Surface Transportation on S-2362 and other acts. Serial number 92-71, particularly at page 292 and following, Mr. Lanier,then vice president

of the Louisville and Nashville Railroad Company, discusses with Senator Beall certain thoughts on this subject. Clearly Mr. Lanier evidenced a preference for the broader term of "any other property" while the Senator was attempting to elicit from him reasons why he thought it unfair to compare the property with other commercial or income producing property. A enlightening discussion followed between Mr. Lanier, Senator Pearson and Senator Hartkey, at page 295 of the same

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28 Senator Hartkey: ". . . let me say really what we are talking about. There is no one on this committee that I know of who is in favor of discrimination. But you do have a problem here, that I think you can see, that the committee members, I think all of us, do not want to go through another useless exercise when the bill comes up over at the House. And as of now I think it's not quite clear how you would overcome that argument which is being made - that is, where do you fit?

In other words, I think it's a definition of terms. When you say that you don't want to be classified with commercial property, or with business property when you are in a business, and when you say you want to be classified as all other property, you are back to the same problem, the question of definition - what is all other property?"

report.[28] In answer to Senator Hartkey's question Mr. Lanier apparently furnished the committee with a revised definition which, as shown on page 296, was subsequently received for the record. [29]

It is obvious that the spokesmen for the railroads at that time were not arguing for commercial and industrial property, nor were they arguing for the state's authority to exempt what they call the usual limited exemptions as religious, charitable, etc. Some logic could be, perhaps, ascribed to a meaning in the context of the use of the words "all other property" to mean that

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29 That definition reads, "the term 'all other property' means, in the case of real property used in transportation, all other real property other than land used primarily for agricultural purposes or primarily or the purpose of growing timber; in the case of tangible personal property used in transportation, all other tangible personal property; and in the case of intangible personal property used in transportation, all other intangible personal property. (Note - no mention was made of "traditionally exempt" property.)

churches and state office buildings were not really all other property because they are never considered in the tax base of a state or county.

The unit of comparison was changed before the final version from "all other property" to "commercial and industrial property." 30

Contrary to Appellants'argument, traditionally exempt properties would not by their very nature be included as commercial and industrial property.

Assuming for purposes of argument that the term "all other property" could somehow be said to exclude traditionally exempt properties, it does not follow that the statutory definition of commercial and industrial property used in each of the Acts

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30 S. Report Number 92-1985, 92nd Congress, Second Session at 2 (1972; Senate Report Number 94-585, 94th Congress, First Session, page 14, 138 (1974))

carries the same connotation. The section in question, 49 U.S.C. 1513(d) (2)(D), specifically excludes two types of property, namely transportation property and land used primarily for agricultural purposes or for timber. Therefore, without that exclusion the section reads, "commercial and industrial property means property devoted to a commercial or industrial use and subject to a property tax levy." By what stretch of the imagination would religious, charitable or governmental property ever be considered to be devoted to a commercial and industrial purpose? This would have to be the case if the Appellants' argument is to hold water. Clearly it can only be the property devoted to the commercial and industrial use which is subject to a property tax levy.

Several lower federal courts have explored this point and have held that property "subject to" a tax levy is property

which is presently taxed. Property which is for any reason tax-exempt is excluded as a form of commercial and industrial property. [31] Also the term "commercial and industrial property," as defined and used in the 4-R Act does not include inventory which is not subject to property tax. [32] This was affirmed in the Ninth Circuit Court of Appeals [33] with the comment, "We find no authority requiring untaxed property to be included in an average"

included in an average" [34] of assessed value for taxed property."

31 Atchinson, Topeka and Santa Fe Railway Company v. State of Arizona, Southern Pacific Transportation Company v. State of Arizona (D. Az. 559 F.Supp. 1237, 1983)

32 ACF Industries Inc., v. State of Arizona, (D.Az. 561 F.Supp. 595, 1982)

33 714 F.2d 93 (1983)

34 Amici Railway Progress Institute at page 20 pass off lightly these holdings, saying they are irreconcilable with Congressional intent. But Congress certainly had a purpose in making railroads exempt from "another tax that discriminates against a rail carrier," but not including that language in the Air Carrier Act

Appellants have also contended that the meaning of the term "commercial and industrial property" subject to a property tax levy could be used in the sense that it could be taxed if the people of the state chose to amend their Constitution, if the legislature subjected the property to a tax levy or if it was any property which the state had power to tax at all, Appellants' Brief, page 13. The cases just cited hold against that contention.

The Brief of Amici Railway Institute and Association of American Railroads on page 16, makes an incorrect statement concerning the reasons for the words "subject to a property tax" in its reference to S. Rep. Number 91-630, 91st Congress, Second Session, page 11 (1969). Nowhere in that report as referenced is there any discussion of the phrase "subject to a

property tax." Senate 2289,(c) [35] forbids state or local classifications whether based on constitutional provisions, statutory enactment or administrative orders, or practices designed or having the effect of discriminating against carrier transportation property by making it subject to a tax rate higher than the rate applicable to other property in the taxing district. According to the cited report, it was not intended to abrogate the right of a state to establish separate rates for different traditional classes of property, i.e. one rate for real property another, perhaps, for personal property and yet another for intangible properties. At the point in time when that report was issued the phrase "and subject to a property tax" was not in the law.

35 "(c) The collection of any ad valorem property tax on such transportation property at a tax rate higher than tax rates applicable to any other property in the taxing district."

It is interesting to note that the report of the Committee on Conference on S-2718, Report No. 94-595, 94th Congress, Second Session, which explains the 4-R Act as it was finally proposed and adopted based on the Conference Committee substitute, does not support the position taken by Appellants. That position being that only traditionally exempt property is included under the heading of property which is otherwise subject to a property tax. The Report, at page 165, describes the subject of the anti-discrimination legislation as prohibiting discrimination on rates or values generally applicable to "commercial and industrial property in the same assessment jurisdiction." Congress did not want the comparison to be made with all other property, neither did it want it to be made with all other transportation property. Congress provided only for the comparison with commercial and

industrial property excluding other transportation property and land, used primarily for agricultural purposes or timber growing, but not property which is not subject to a property tax levy.

Appellants and Amici have suggested this interpretation produces an absurd result which could well happen if a state were to exclude from a tax levy all other commercial and industrial property except centrally assessed property. It seems extremely unlikely, first, that a state would reduce its tax base where in most instances centrally assessed property is less than ten percent of the total base in the state and, secondly such open and notorious discrimination would, even without these particular tax acts, undoubtedly result in courts finding a denial of equal protection.

The law of South Dakota does not discriminate against Appellants and

courts have consistently held for equalization with other property.

In South Dakota the personal property tax which had been called a "liar's tax," on household goods and personal affects, was repealed in 1978 [36] one year later the business inventory tax was repealed. [37] This could scarcely be said to be a insidious plot to overtax utilities. In addition, the state legislature has annually replaced the personal property revenue loss with an appropriation of $40 million to the local subdivisions. This appropriation prevents shifting of the burden to taxable property. The Appellants have benefited from this appropriation.

The South Dakota Supreme Court has consistently upheld the right of railroads

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36 Section 1', Ch. 72, Ch. 73, Laws of 1978
37 Section 2, Ch. 72, Laws of 1978

and utilities to be free from tax discrimination.

In the first of these cases the Milwaukee Railroad and the Chicago Northwestern Railroad went directly to the South Dakota Supreme Court in an original proceeding for a Writ of Mandamus. [38] The South Dakota Supreme Court held that railroad property must be taxed under the same formula as other property. The state assessor thereupon began to take sixty percent of the full value of utility property.

RAILROAD LITIGATION

In 1963 the Chicago Northwestern Railroad again appealed from the state assessment of its property. Although the trial

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38 Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Gillis 80 S.D. 50, 118 N.W.2d 313 (S.D. 1962) and Chicago, Northwestern Railway Company v. Gillis 118 N.W.2d 316 (S.D. 1962) 80 S.D. 57

court [39] upheld the Commissioner of Revenue's determination of value, the Supreme Court found there was insufficient evidence of the allowance of obsolescence and therefore ordered that the property be reappraised. [40] On the question of equalization with other property the Court stated at 590,

> The railroad was entitled to have its property reduced to the same percentage other property was assessed.

However, since there was no evidence in the record of the percentage of value of personal property and since much of the railroad's property was personal, it was determined at that point the state was not required to use only the real property index. This case was

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39 Chicago & Northwestern Railway Co. v. Gillis 80 S.D. 617, 129 N.W.2d 531 (S.D. 1964)

40 Since the 4-R Act was the forerunner of Federal Tax Anti Discrimination legislation involving common carriers, a brief history of contemporaneous litigation in South Dakota is given for background purposes.

heard again in 1968, [41] and the court ordered a reduction of 44.19% of the system's total mileage based on an obsolescence factor relating to traffic density. Once more the Chicago Northwestern came to the South Dakota Supreme Court in 1971, [42] with respect to its property in the forty-one counties in South Dakota. This case challenged the 1964 valuation of the railroad and concerned the same proviso relating to a sixty percent of assessed value to be taken for taxable value. The claim of the railroad was that such valuation discriminated against it and in favor of other taxpayers whose property was assessed locally. This discrimination, the railroad claimed, was caused because the taxable value of their property was determined by applying a factor smaller than the

41 Chicago Northwestern Railway v. Gillis, 159 N.W.2d 293 (S.D. 1968) 83 S.D. 332

42 Chicago Northwestern Railway v. Schmidt, 188 N.W.2d 276 (S.D. 1971)

statutorily prescribed sixty percent. The State urged that the legislature had put the railroad property in a separate class and under the Uniformity Doctrine of the State Constitution [43] only all property in the same class need be treated for tax purposes in the same way.

RAILROAD TO BE TAXED AS ALL OTHER PROPERTY

The State Supreme Court did not accept that position and held that the railroad operating property had not been put in a separate class, either as to the factor to be used in arriving at its taxable value or as to the rate of tax imposed. The court referred to its decision in Milwaukee v. Gillis, 118 N.W.2d 313 (S.D. 1962), that such property was to be taxed at the same rate as property of individuals. Thus, if the railroads were assessed at a higher percent of true and full value than other property,

43 Article XI, Section 2

their affective tax rate would have been higher. The court at that time held that the railroad was entitled to have its property assessed at the same percentage on a county by county basis as other property in that taxing district. The next case in the taxation of other centrally assessed property was brought by Pennington County, a tax district of the state, claiming that at this point the State Board of Equalization and Department of Revenue had exceeded their jurisdiction by assessing utility companies at too low a rate.[44] State ex rel Pennington County v. Mernaugh, 210 N.W.2d 409 (S.D. 1973). In this original proceeding in Certiorari, the Court held that real property of all

[44] Thus it is clear that South Dakota even without the Federal legislation treats its taxpayers equitably. The fact that some small portion of personalty is tax-exempt does not entitle Appellants to relief since the property with which their property is compared is taxed uniformly in each county and neither the ratio nor the tax exceeds that of the Appellants.

utilities must be equalized on a county-by-county basis and personal property on the basis of sixty percent of the full and true value. The court clarified that holding but did not change the effect in Northwestern Public Service Company v. Stone, 215 N.W.2d 645 (S.D. 1974).

CONCLUSION

Congress limited to commercial and industrial property subject to tax the basis for comparison to establish discriminatory tax practices. South Dakota has not discriminated either under the criteria of Federal law or under state law. The Judgment of the South Dakota Supreme Court should be upheld.

Respectfully submitted,

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APPENDIX A

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value

that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection--

(A) "Assessment" means valuation for property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

SOUTH DAKOTA CODIFIED LAWS

10-29.8. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may

add any property omitted from the return of such companies.

10-29-9. In making such assessment, which shall be reference to value and ownership on February first of the year for which the assessment is made, the secretary of revenue shall determine the true and full value of that flight property actually providing service in this state. The taxable value of such airline flight property upon which the levy shall be made and the taxes shall be computed at the same percentage as determined under §10-6-33.

10-29-10. The valuation of such flight property properly apportioned to this state shall be determined to be the proportion of the total valueation thereof, based on the average of the total of the following three ratios for each type of aircraft:

(1) That ratio which the total tonnage of passengers, express and freight

first received by the airline company in this state during the preceding calendar year plus the total tonnage of passenger, express and freight finally discharged by it within this state during the preceding calendar year bears to the total of such tonnage first received by the airline company or finally discharged by it, within and without this state during the preceding calendar year;

(2) That ratio which the flight time of all aircraft of the airline company on flights serving this state during the preceding calendar year bears to the total of such time in flight within and without this state during the preceding calendar year;

(3) That ratio which the number of revenue ton miles of passengers, mail, express and freight flown by the airline company on flights serving this state during the preceding calendar year bears to the total number of such miles flown by it within and without this state during the preceding calendar year.

10-29-11. Any airline aggrieved by the valuation of the flight property, or the application to its case of the apportionment methods prescribed by §10-29-10, may petition the secretary of revenue for determination of the valuation or the apportionment thereof to this state by the use of some other method. Thereupon, if the secretary finds that the application of the methods prescribed in §10-29-10 will result in inequities, he may determine the valuation, or apportionment

thereof, by other methods if satisfied that such other methods will fairly reflect such valuation or apportionment thereof.

10-29-14. The secretary of revenue shall, after assessing airline flight property as provided in this chapter and after such assessment has been equalized by the state board of equalization, compute a tax on that valuation by applying to that portion of the valuation which by law is subject to tax, the average mill rate which is obtained by dividing the total taxable valuation of all property for the preceding year within this state into the total of all state and local taxes levied within the state on a millage basis for the present year.

10-29-15. The taxes imposed by this chapter shall be allocated by the secretary of revenue to the airports where such airline companies make regularly scheduled landings and shall be used

exclusively by such airports for airport purposes as determined by the local airport governing body and approved by the department of transportation. Allocation shall be as follows:

(1) Twenty-five percent of the total tax assessed from each airline company shall be allocated equally to each airport in this state served by such airline company;

(2) Seventy-five percent of the total tax assessed to each airline company shall be allocated to each airport in this state served by each airline company on the basis which that ratio of total tonnage of passengers, mail, express, and freight first received and finally discharged at each airport in this state by such airline company during the preceding calendar year

bears to the total tonnage of passengers, mail, express and freight first received and finally discharged at all airports in this state served by such airline company during the preceding calendar year.

No. 85-722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC. AND OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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REPLY BRIEF FOR APPELLANTS

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October 20, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-732

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

REPLY BRIEF FOR APPELLANTS

In its brief, South Dakota concedes that "there can be no question" that the code provision here in issue, 49 U.S.C. § 1513(d), was "passed to prevent discrimination in taxation." Br. at 21. Nevertheless, South Dakota argues that the language Congress used in the statute permits the most extreme form of such discrimination—*i.e.*, the taxation of airline flight property and the complete exemption of virtually all non-airline business personalty. The State argues that the phrase "subject to a property tax levy" in the statutory definition of "commercial and industrial property" (the comparison class for purposes of determining whether unlawful discrimination exists) is, in the words of the court below, capable of only one "clear and unambiguous" interpretation. According to the State, the "subject to" phrase refers to property that is not only *capable of* being taxed but is *actually being*

taxed, so that the State may tax air carrier property at any rate it desires as long as non-air carrier commercial and industrial property is wholly exempt from taxation.

South Dakota's assumption that the term "subject to a property tax levy" is unambiguous and capable of only one interpretation is simply incorrect. The State would have the phrase read as referring to property "being taxed," or property "subjected to" a property tax levy. Instead, however, Congress used the words "subject to" which are more naturally read as referring to something which *may* occur. When something is "subject to change" it is capable of being changed; when it is "subject to" a tax levy it is capable of having such levy imposed. This is illustrated by cases arising under the Internal Revenue Code, where courts have read "subject to taxation" as meaning "capable of being taxed" in opinions that also underscore the importance of considering the congressional purpose.[1]

[1] In A.O. Smith Corp. v. United States, 691 F.2d 1220 (7th Cir. 1982), the issue centered on section 6154(a) of the Code which requires every corporation "subject to taxation under Section 11" to pay a quarterly estimated tax. 26 U.S.C. § 6154(a) (1980). Section 11 is the general corporate tax provision. 26 U.S.C. § 11 (1984 and Supp. 1986). Taxpayer challenged the application of the estimated tax provision to the recapture of investment tax credits under section 47, 26 U.S.C. § 47 (1984 and Supp. 1986), arguing that recapture was not provided for in section 11, hence it was not "subject to taxation" under that section and in fact its tax under section 11 was zero. Rejecting such a narrow definition of the "subject to taxation" language, the court stated it could not "imagine a theory on which Congress could have desired assymetrical treatment" of recaptured credits depending on whether taxpayer was directly subject to a tax under section 11 or to recapture under section 47. *Id.* at 1221. Similar results have been reached in applying the Section 7701(a)(14) definition of taxpayer as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14) (1967 and Supp. 1986); *see* Thompson v. United States, 332 F.2d 657, 662 n.12 (5th Cir. 1964) ("Status as one subject to a tax need not necessarily require unquestioned liability for it. That might turn on intricate legal and factual questions, *e.g.*, status as a charitable trust, etc.").

In the decision below, the South Dakota Supreme Court need not have looked beyond the language of antecedent enactments governing railroads and motor carriers to conclude that in this case "subject to" tax could mean "capable of" being taxed. In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (as recodified at 49 U.S.C. § 11503 (Supp. 1985)), and the almost identical motor carrier provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a), 94 Stat. 793, 823 (codified as amended at 49 U.S.C. § 11503a (Supp. 1985)), Congress used the phrase "subject to a property tax levy" interchangeably with the phrase "taxable property." Both the rail and motor carrier provisions, like 49 U.S.C. § 1513(d), prohibit assessment discrimination and rate discrimination. They further provide that if an adequate sales assessment ratio study is not available for commercial and industrial property, the court may make comparisons, for both assessment and rate purposes, between transportation property and all other property, not just commercial and industrial property. 49 U.S.C. §§ 11503(c), 11503a(c). Significantly, these provisions refer to such other property both as "all other property . . . subject to a property tax lavy" and as "taxable property" in the taxing district.[2] The dictionary definition of

[2] Section 306(2)(e) of the 4-R Act reads:

> (e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of *all other property* in the assessment

"taxable" is "capable of being taxed."[3] The use of the term "taxable" interchangeably with "subject to a property tax levy" in a way that suggests that Congress saw them as equivalents clearly does not support the State's argument that the "subject to" phrase is capable of only its interpretation.[4]

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jurisdiction in which is included such taxing district and *subject to a property tax levy* bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to *taxable property* in the taxing district. (Emphasis added.)

In 1978, Congress recodified Title 49. This recodification of Title 49 in 1978 altered the language of section 306 but the changes were not intended to affect the meaning of the Act. *See* Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1337, 1466. The full text of § 306 appears as Appendix C to the Brief of *Amici* Railway Progress Institute and Association of American Railroads.

[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2345 (1976).

[4] This is true with respect to the air carrier legislation even though the reference to "taxable" does not appear in § 1513(d). That section does not include any of the incidental provisions which appear in the rail and motor carrier versions. The legislative history gives no explanation, although it may be significant that the bill proposed by the airlines did not contain them. *See Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings on H.R. 4065 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 186, 244-45 (1981) (statement of Paul R. Ignatius, President and Chief Executive Officer, Air Transport Association of America). In any event it is clear that Congress had in mind no less protection against discrimination for the airlines than for the carriers whose legislation contained the extra provisions. The Conference Report adopting the air carrier provision stated:

> The provision makes current law which prohibits the assessment, levying or collecting of taxes on motor carrier property in a manner different from that of other commercial and industrial property, applicable to air carriers.

H.R. REP. NO. 760, 97th Cong., 2d Sess. 722, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1190, 1484.

The State, however, argues that commercial and industrial property by its nature is capable of being taxed and that petitioners' position must therefore be rejected because it would render the phrase "subject to a property tax levy" surplusage, in contravention of familiar canons of construction. Br. at 31. This argument is also incorrect because there are significant categories of commercial and industrial property that are *not* capable of being taxed by states, such as property that is not taxable under constitutional principles or federal statutes and is nevertheless devoted to a commercial or industrial use.[5] It also appears that property which has been traditionally nontaxable under state law was intended to be covered by the "subject to" phrase. Such non-taxable property could include commercially used property of traditionally exempt organizations such as libraries, universities, art galleries, etc. which states choose not to tax.[6]

Given the different possible readings of "subject to a property tax levy," resort to legislative history is inescapable. The South Dakota Supreme Court wholly

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[5] Examples include power plants operated by federal corporations like the Tennessee Valley Authority, railroad rolling stock owned by the National Railroad Passenger Corporation, 45 U.S.C. § 546b (Supp. 1986), post exchanges on military bases, national park lands leased to private interests for commercial use, government owned machine tools leased to industry for commercial use, and property related to commercial activities on Indian reservations. *Cf.* White Mountain Apace Tribe v. Bracker, 448 U.S. 136 (1980); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).

[6] For example, Idaho exempts property entirely from real estate taxes "if the value of the part used for commercial purposes is determined to be three percent (3%) or less than the value of the entirety." IDAHO CODE § 63-105C (1976). In Indiana the test employed is whether the "dominant use" of the property has been for purposes that are exempt. Sahara Grotto and Styx, Inc. v. State Board of Tax Commissioners, 147 Ind. App. 471, 479, 261 N.E.2d 873, 878 (1970).

ignored that legislative history, preferring instead to rely on a tangential Eighth Circuit decision.[7] In its brief, the State makes some reference to the legislative history but can point to nothing in that history to support the State's assertion that Congress intended to permit discrimination by blanket exemption of non-air carrier business property.

The State's principal argument seems to be that the shift in language in earlier versions of the legislation from "all other property" as the comparison class to "commercial and industrial property" shows an intent to allow states discretion to do what South Dakota has done. We fail to see how that conclusion can be drawn. Congress' "zeroing in," as the State describes it, on business property as the real source of concern about discrimination scarcely supports the notion that Congress thereby

[7] Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), involved discriminatory taxation of railroad property by North Dakota under § 306 of the 4-R Act. The state had argued, as South Dakota does here, that it was free to exempt non-carrier property without violating the statute. The lower court accepted the State's argument but found the tax invalid under a catch-all provision in § 306(1)(d) of the statute which prohibits "any other tax which results in discriminatory treatment of a common carrier by railroad." *Id.* at 209. The Court of Appeals in affirming did not specifically examine the question of a state's right to exempt non-carrier property in the absence of a catch-all provision. (The catch-all language does not appear in the air carrier statute presumably because, as pointed out in our opening brief (pp. 27-28), 49 U.S.C. § 1513(a) already prohibited the kind of gross receipts tax at which the railroad provision was aimed.)

The State's brief mentions several other lower court decisions and one court of appeals decision which, like the South Dakota Supreme Court, ignore the purpose and legislative history of § 1513(d) and thus arrive at the same erroneous conclusion. *E.g.*, ACF Industries, Inc. v. Arizona, 714 F.2d 93 (9th Cir. 1983) (discussed in our opening brief at 25 n.29).

intended to make it easier for states to *exclude* business property from the comparison class.[8]

By contrast, the legislative history in support of Appellants' interpretation is powerful and consistent, reflecting if anything a stronger intent to prohibit all forms of discrimination at the time Congress finally acted than in earlier Congresses. That intent is best illustrated by the House's specific rejection in floor debate on the 4-R Act[9] of a Senate amendment (the "Tennessee Amendment") which would have made the statute inapplicable to any state which "has in effect a provision of its constitution (or an amendment thereto) which provides for the reasonable classification of property for State purposes." 121 CONG. REC. 41400 (1975).

The Tennessee constitutional provision at which the Amendment was aimed called for the assessment of railroad and other public utility property at 55% of true value, industrial and commercial property at 40% and residential and farm at 25%. Presumably these were

[8] For example, the following statement on the floor by Congressman Kuykendall during House consideration of the legislation in 1974:

> There has been a great deal said about the State tax discrimination part of this bill. All this bill attempts to do is simply to tell each State involved in taxation of interstate railroads that that State may not tax the property of a railroad any more than they tax the property of General Motors or United States Steel.

120 CONG. REC. 38733 (1974). The personal property of General Motors or United States Steel would be exempt from taxation under S.D. CODIFIED LAWS ANN. § 10-4-6.1 (1982).

[9] *See* 121 CONG. REC. 41400-41401 (1975). Congressman Adams, a principal sponsor of anti-discrimination legislation, concluded his remarks in opposition to the Amendment as follows: "[T]he whole purpose of this particular provision was to say that the States through which transportation companies are passing shall tax them fairly with their other items." *Id.* at 41401 (statement of Rep. Adams).

regarded as "reasonable" classifications under the proposed amendment. The Conference nevertheless upheld the action of the House.[10] This rejection by Congress of "reasonable" discriminatory classifications with respect to railroads—an expression of intent equally applicable to airlines[11]—clearly leaves no room for states to evade section 1513(d) through classifications as extreme as South Dakota's scheme of total discrimination against air carrier flight property.

For the foregoing reasons, the judgment of the Supreme Court of South Dakota upholding that State's airline flight property tax must be reversed.

Respectfully submitted,

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October 20, 1986

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[10] S. REP. No. 595, 94th Cong., 2d Sess. 166, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 148, 130-81.

[11] While section 1513(d) differs from the railroad and motor carrier legislation in various incidental respects, Congress has made clear that its overall intent was the same. *See supra* note 4. The record shows in fact that the airlines, in making their case for similar legislation, called Congress' attention to the kind of state constitutional discrimination the Tennessee Amendment would have allowed. Appellants' Brief at 20-21.

APPENDIX

APPENDIX

The following changes have occurred since the changes in Appellants' corporate affiliations were listed at page A-18 of Appellants' Brief:

A. Appellant Western Air Lines, Inc. has agreed to be acquired by Delta Air Lines, Inc.

B. NWA, Inc., parent of Northwest Airlines, Inc., has completed its acquisition of Appellant Republic Airlines, Inc.

C. People Express Airlines, Inc., parent of Appellant Frontier Airlines, Inc., has agreed to be acquired by Texas Air Corp., parent of Continental Airlines Corp. and Eastern Air Lines, Inc.

D. Trans World Airlines, Inc., has completed its acquisition of Ozark Holdings, Inc., parent of Appellant Ozark Air Lines, Inc.

No. 85-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC; FRONTIER AIRLINES, INC.; AND OZARK AIRLINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,

Appellees.

On Appeal From The Supreme Court Of The State Of South Dakota

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BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property of the same type." The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 1513(d)(2)(D). Does this definition permit a state to escape § 1513(d)'s prohibition by wholly exempting business property from taxation, while simultaneously imposing a tax on air carrier transportation property?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

No. 85-732

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Appellees.

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

This brief in support of the Appellants is filed with the consent of the parties. Letters from the parties stating their consent have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Air Transport Association of America ("ATA") is a trade and service association headquartered in Washington, D.C. ATA has thirty-one member airlines[1/] which provide daily scheduled service throughout the United States.

ATA member airlines, including the Appellants herein, are concerned that Section 7(d) of the Airport Development Acceleration Act of 1973 is construed properly to achieve the goal of that provision. If South Dakota's interpretation of Section 7(d) spreads to other states, then all of ATA's members will experience a significant adverse impact on their abilities to operate in interstate commerce. For this reason, ATA has a significant interest in the outcome of this case.

STATEMENT OF THE CASE

Prior to 1978, South Dakota taxed commercial and business personal property. In 1978, South Dakota revised its personal property tax scheme and

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1/ The member airlines of ATA are: AirCal, Inc., Air Canada, Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff, Inc., Continental Airlines Corporation, CP Air, Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Jet America Airlines, Inc., Midway Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, PSA-Pacific Southwest Airlines, Inc., Purolator Courier Corporation, Republic Airlines, Inc., TranStar Airlines Corporation (formerly Muse Air Corporation), Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, USAir, Inc., Western Airlines, Inc., and World Airways, Inc.

exempted from taxation all personal property not centrally assessed. S.D. Codified Laws § 10-4-6.1.

The tax on airline flight property imposed by S.D. Codified Laws §§ 10-29-2, -8, however, remained unaffected by the 1978 revision since that tax -- like the tax imposed upon railroads and other public service and utility companies -- was assessed centrally by the State Department of Revenue.[2/] By this method of property classification by exemption, South Dakota "legally" discriminated against airline personal property by

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2/ Central assessment was retained for airlines, railroads, telephone and telegraph companies, electric utilities, and pipelines. See S.D. Codified Laws §§ 10-6-34.1, -29-2, -28-1, -33-10, -34-8, -35-2, and -37-9.

imposing a tax on airline property not imposed upon the vast majority of personal property in South Dakota dedicated to commercial and industrial use.

By 1982, Congress had become aware that airlines, like surface transportation common carriers, were the object of tax practices imposed by states which discriminated against interstate commerce moving by air.[3/]

Drawing upon prior legislation intended to end such discriminatory treatment suffered by the railroad,

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3/ ATA President Paul R. Ignatius testified that four states had adopted constitutional provisions which classified airline property as utilities in order to tax airline property at a higher rate. Hearings Before the Subcomm. on Aviation, House Committee on Public Works and Transportation, 97th Cong., 1st Sess. 216-17 (1981).

trucking and bus industries,[4] Congress amended Section 7 of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, to prohibit the "assessment, levying, or collecting of taxes on [air carrier] property in a manner different from that of other commercial and industrial property."[5] Specifically,

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[4] Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210 § 306(1)(a), 90 Stat. 54, recodified at 49 U.S.C. § 11503 (hereinafter the "4-R Act"); Motor Carrier Act of 1980, Pub.L. No. 96-296, § 31(a)(1), 94 Stat. 823, codified at 49 U.S.C. § 11503a; Bus Regulatory Reform Act of 1982, Pub.L. No. 97-261, § 20, 96 Stat. 1102, amending 49 U.S.C. § 11503a to include bus transportation property.

[5] H.Con.Rep. No. 97-760, 97th Cong., 2nd Sess. 722, reprinted in 1982 U.S. Code, Cong. & Admin. News 1190, 1484. Codified at 49 U.S.C. § 1513(d), this amendment was enacted as § 532 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, 701.

Congress prohibited states from assessing air carrier property at a ratio to fair market value higher than the ratio used to assess other commercial or industrial property, and from levying or collecting taxes based on such an assessment. 49 U.S.C. §§ 1513(d)(1)(A) and (B). States were further prohibited from applying a discriminatory tax rate to airline property. 49 U.S.C. § 1513(d)(1)(C).

On the basis of Section 1513(d), the appellants herein sued the South Dakota Board of Equalization to obtain a refund of their 1982 personal property taxes, and challenged the assessment made against their personal property for the year 1983.[6] The Circuit Court for

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[6] See Appellants' Brief for a full description of the proceedings below.

the Sixth Judicial Circuit (Hughes County) denied the refund claims and upheld the 1983 assessments, holding that the tax was a proper "in lieu" tax permitted under 49 U.S.C. § 1513(d)(3).

On appeal, the South Dakota Supreme Court reversed the holding that the tax on airline flight property was an "in lieu" tax, but nevertheless affirmed the judgment.

Despite the unmistakable purpose and intent of Congress in enacting this remedial legislation, the South Dakota Supreme Court held that discrimination under section 1513(d)(1) is a fortiori impossible because, by definition, the comparison class of property is limited to "property . . . devoted to a commercial or industrial use and subject to a

property tax levy."[7/] Since under South Dakota law only centrally assessed property is subject to a tax levy, the court refused to compare, for purposes of section 1513(d) analysis, personal property devoted to commercial or industrial use which was classified exempt for ad valorem tax purposes. Western Airlines, Inc. v. Hughes County, 372 N.W.2d 106 (S.D. 1985).

Justice Henderson did not concur in this literal and mechanistic analysis employed by the majority. Recognizing that the majority's analysis would result in unreasonable and "absolute"

7/ "Commercial and industrial property" is defined in 49 U.S.C. § 1513(d)(2)(D) to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy."

discriminatory taxation of airline flight property, Justice Henderson argued that the court should adopt the reasoning employed by the Supreme Court of North Dakota in Northwest Airlines, Inc. v. State Board of Equalization, 358 N.W.2d 515 (N.D. 1984). The court in Northwest, considering a tax scheme nearly identical to the South Dakota tax scheme, held that:

> assessing and taxing the Airline's personal property while exempting other commercial and industrial personal property from taxation is prohibited by 49 U.S.C. § 1513(d).

Id., 358 N.W.2d at 517.

Acting on the notice of appeal and jurisdictional statement filed herein, this Court noted probable jurisdiction. ___ U.S. ___ (February 24, 1986).

SUMMARY OF ARGUMENT

1. The Supreme Court of South Dakota, in sustaining the state's tax on airline flight property, reached a decision which is in absolute opposition to the fundamental purpose of 49 U.S.C. § 1513(d). Congress enacted § 1513(d) to prohibit states and municipalities from taxing airline commercial and industrial property differently from other commercial and industrial property. Both the language of the statute itself and the legislative history make this abundantly clear.

The court below, however, ignored this mandate to achieve an absurd and incongruous result. Fundamental rules of statutory construction espoused by this court clearly require that whenever possible, a statute is to be construed to give effect to its stated

purpose, and unreasonable results are to be avoided. The court below, however, ignored these principles and literally applied a definition which, under the facts of the case, was clearly inconsistent with the statute's purpose.

2. By exempting from taxation virtually all commercial and industrial personal property in the State except for airline property and the property of only a few other entities not at issue here, South Dakota has promulgated a property classification system which results in absolute discrimination. Cases construing § 306 of the Railroad Revitilization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, which § 1513(d) is ultimately patterned after, have held that this provision prohibits classification schemes which

result in discriminatory taxation. It is incomprehensible to believe that for purposes of § 1513(d) analysis, Congress would prohibit partial exemptions from the comparison class, but would allow complete exemptions.

The legislative history surrounding the use of the phrase "subject to a tax levy" as used in § 1513(d) to define commercial or industrial property supports an interpretation that Congress simply used this phrase in a shorthand fashion to exclude from the comparison class property traditionally exempted from taxation, such as property owned by churches or charities. Such an interpretation is consistent with the overriding purpose of § 1513(d) and further supports those cases which prohibit discriminatory classification systems.

ARGUMENT

THE SOUTH DAKOTA SUPREME COURT FAILED TO CONSTRUE SECTION 1513(d) IN ACCORDANCE WITH ITS PURPOSE

1. The Purpose of Section 1513(d) is to Prohibit All Forms of Discriminatory Property Taxation of Airline Personal Property.

The purpose of § 1513(d) is manifestly clear from the language of the statute itself. Congress unambiguously declared anathema state taxing schemes which discriminate against air transportation property moving in interstate commerce:

> (d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property

> than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
> (B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph: or
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 1513(d) (Supp. II, 1984).

House Conference Report No. 97-760, supra, confirms that the purpose of Section 1513(d) is to prohibit discriminatory property tax practices.

Section 7 of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, was passed initially by Congress to relieve airlines and consumers from the burden of proliferating local taxes

on interstate transportation services. Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 9-10 (1983). Consistent with this remedial purpose, Congress appended the new provision as subsection (d) of Section 1513. This simple act is yet another manifestation of the intent of Congress in passing § 1513(d). Clearly, the purpose of the provision as a whole, and of § 1513(d) in particular, is to protect airlines operating in interstate commerce from burdensome and discriminatory tax treatment by states and municipalities.

2. Section 1513's Purpose Guides the Manner in Which it is Construed.

Well established rules of statutory construction teach us that legislation such as Section 1513(d), enacted to

remedy an existing problem,[8/] should be construed liberally in order to effectuate its purpose. Piedmont and Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299, 311-12 (1932). Moreover, where, as here, a provision is susceptible to alternative constructions, the alternative which best serves that purpose is applied. Lawson v. Suwannee Fruit and Steamship Co., 336 U.S. 198 (1949). One commentator has noted that the manifest reason and obvious purpose for a law should not be sacrificed to a literal interpretation of its words. 2A Sutherland Statutory Construction § 46.07 (4th Ed. 1984). Similarly, this Court has stated on many occasions that the law favors a rational

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8/ Supra, n. 3.

and sensible construction, and that absurd and unreasonable results should be avoided. American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982); United States v. Bryan, 339 U.S. 323 (1950).

The decision below by the South Dakota Supreme Court is just such a result to be avoided. In surprisingly parochial fashion, the court did not give any consideration to the remedial purpose of Section 1513(d), but mechanically applied the statute to reach a decision totally and utterly at odds with its purpose.

In comparison, the North Dakota Supreme Court refused to countenance a nearly identical provision of its own

tax laws.[9/] Northwest Airlines, Inc., supra.

In Northwest, the court had before it the question of whether the State's tax on airline personal property violated Section 1513(d) because of the exemption afforded by the State to virtually all other commercial and industrial personal property. Addressing the argument advanced by North Dakota that the definition of commercial and industrial property should be read literally, the North Dakota Supreme Court stated:

> The construction urged by the State would allow discriminatory taxation of air carrier transportation property as long as the state imposed no tax at all on other commercial and

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9/ Section 57-02-08(25), N.D.C.C. (1982).

industrial property. We cannot reasonably so construe the statute.

> The intent of Congress . . . was to prohibit discriminatory state taxes because of the adverse effect of such discrimination on interstate commerce. In that light, we cannot assume that a law which completely exempts all property (not usually exempt because of its charitable or eleemosynary character) except airline property and other property not relevant here was not meant to be covered by the Act. Interpreting 49 U.S.C. §1513(d) as the State would have us do would permit greater discrimination when the property is completely exempt than when it is taxed, but at a lower rate. That is unreasonable . . . statutes must be construed to avoid ludicrous and absurd results.

Northwest Airlines, Inc., supra, at 517, emphasis added (citations omitted).

Thus, the North Dakota Supreme Court was unable to justify a result which would have been absurd in light of the purpose of § 1513(d).

In Lawson v. Suwannee Fruit and Steamship Co., supra, this Court had before it the problem of construing § 8(f)(1) of the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, to determine liability as between the Second Injury Fund and the employer-respondent. Specifically, the Court was faced with the issue of whether Congress intended to use the term "disability" in § 8(f)(1) as defined elsewhere in the statute, or in its ordinary sense. 336 U.S. at 201-202.

In reaching its decision, the Court reviewed the legislative history of the second injury provisions. The Court found that the purpose of the second injury provision was to protect handicapped workers from discrimination, and

to protect employers who hire previously injured employees from liability out of proportion with work related injuries suffered by such employees.

Because of this overriding purpose, the Court concluded that the statutory definition of "disability" would not be applied mechanically to defeat the purpose of creating the fund:

> If we read the definition into § 8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

Lawson, 366 U.S. at 201.

Just as the North Dakota Supreme Court was compelled to avoid a construction producing "ludicrous and absurd" results, the rules of statutory con-

struction embraced by this Court require that the decision below be reversed. It defies any degree of common sense to believe that Congress would have intended to prohibit discrimination by means of partial exemptions from taxation while permitting states to discriminate against air carrier property by totally exempting from taxation whole classes of property. Such a construction truly turns §1513 on its head.

SOUTH DAKOTA'S SCHEME OF CLASSIFICATION BY EXEMPTION VIOLATES SECTION 1513(d)

1. Section 1513(d)'s Prohibition Extends to Discriminatory Classification Systems.

South Dakota law states that personal property "which is not centrally assessed is hereby classified for ad

valorem tax purposes and is exempt from ad valorem taxation." S.D. Codified Laws § 10-4-6.1 (emphasis added). By its own terms, this provision is a property classification system. South Dakota's classification system, however, is based not on the nature of the property, but on the manner of assessment, a standard which is completely arbitrary.

From hearings conducted on predecessor bills leading to the enactment of § 306 of the 4-R Act,[10/] it is clear

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10/ As noted in H.Con.Rep. 97-760, supra, § 1513(d) is based specifically on § 31 of the Motor Carrier Act. In Arkansas-Best Freight System, Inc. v. Lynch, 723 F.2d 365 (4th Cir. 1983), the Court noted that the language of § 31 parallels § 306 of the 4-R Act, and that the legislative history of the 4-R Act is relevant to interpreting § 31 of the Motor Carrier Act. For the reasons stated in Arkansas-Best, the legislative

that Congress had serious concerns about state property tax classification systems, such as South Dakota's, which were based on a standard other than the character of the property.[11/]

Accordingly, section 306 of the 4-R Act has been held to prohibit property classification systems which result in discriminatory taxation of railroad personal property. Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); State of Tennessee v. Louisville

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(continued from previous page)

history of the 4-R, Act and cases interpreting that Act, are likewise relevant to a proper construction of § 1513(d).

11/ Discriminatory Taxation of Common Carriers: Hearings Before the Subcommittee on Surface Transportation of the Senate Commerce Committee, 90th Cong., 1st Sess. 71 (1967).

& Nashville R. Co. 478 F.Supp. 199 (M.D.Tenn. 1979), aff'd mem., 652 F.2d 59 (6th Cir.), cert. denied, 454 U.S. 834 (1981).

In Clinchfield Railroad Co. v. Lynch, 784 F.2d 545 (4th Cir. 1986), North Carolina granted stored tobacco inventory a statutory reduction and taxed such property at only 60 percent of its fair market value. Clinchfield and other railroads sued North Carolina, claiming a violation of § 306 of the 4-R Act.

In considering North Carolina's argument that the 4-R Act does not prevent a state from classifying property, the court stated:

> Certainly, the 4-R Act does not encroach upon the State's right to tax its citizens as it sees fit, so long as that tax does not discriminate against railroads. The problem . . . is not that it grants tax breaks for certain agricultural products. But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect of the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would soon be swallowed up in the exceptions.

Clinchfield R. Co., supra, at 552 (emphasis added).

The reasoning of the Fourth Circuit is wholly applicable in this instance. By exempting from taxation all but only a few types of industrial and commercial personal property, South Dakota has caused the "antidiscriminatory spirit and intent" of § 1513(d) to be "swallowed up." Although the South Dakota classification system may have administrative efficacy, when its application to airline personal property is considered in light of § 1513(d), its

discriminatory effect is clear and unmistakable. Airline personal property is subject both to a discriminatory assessment ratio and a discriminatory rate because South Dakota has excluded from the comparison class other commercial or industrial personal property in the same assessment jurisdiction (in this case, the entire state). The South Dakota classification system blatantly violates the fundamental purpose of § 1513(d).

2. The Legislative History Exhibits Congressional Intent to Limit the Types of Property to be Excluded From the Comparison Class.

As noted in the House Conference Report accompanying § 1513(d),[12/] this

12/ H.Con.Rep.No. 97-760, 97th Cong., 2nd Sess. 722 (1982), reprinted in 1982 U.S. Code, Cong. & Admin. News 1190, 1484.

provision was intended to make applicable to airlines the same protection afforded to motor carriers by 49 U.S.C. § 11503a. Section 11503a, in turn, is based upon § 306 of the 4-R Act. The legislative history to § 306 has been held applicable to understanding § 11503a.[13/] It is appropriate, therefore, for this Court to consider the legislative history of § 306 in understanding the intent of Congress in passing § 1513(d); more specifically, what Congress meant when it used the phrase "subject to a tax levy."

In defining commercial or industrial property as property "subject to a tax levy," Congress intended to limit the extent to which the states could

13/ Supra, n. 10.

classify property so as to be excluded for comparison purposes under § 306.[14/] Congress intended that states be allowed to exclude from the comparison class of commercial or industrial property only such property that was historically classified exempt for taxation purposes, such as property owned by churches and charitable institutions. See S.Rep.No. 91-630, 91st Cong., 2d Sess. 11 (1969). Had Congress not used this shorthand phrase, it would have had to enumerate all of the traditional exemptions from

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14/ Congress did not intend, however, to interfere with the right of a state to classify property among the traditional categories of real property, tangible personal property and intangible personal property. S.Rep.No. 1483, 90th Cong., 2nd Sess. 1 (1968) accompanying S. 297, and S.Rep.No. 630, 91st Cong., 1st Sess. 1 (1969) accompanying S. 2289.

taxation granted by each State, a task that needlessly would have complicated the legislation .

That Congress did not intend or expect states to exclude from the comparison class property which was traditionally taxed, whether assessed centrally or locally, is brought home by the fact that, prior to its passage, Congress considered and rejected amendments to the 4-R Act which would have allowed states to "grandfather" discriminatory property classifications authorized by their constitutions. S.Rep.No. 94-585, 94th Cong., 1st Sess. 138-139 (1975); H.R.Rep. No. 94-781, 94th Cong., 2d Sess. 166 (1976). "Congress was unwilling to create any type of exemption whereby a state would not have to comply with [§ 306] . . . ."

Ogilvie v. State Board of Equalization, 657 F.2d 204, 208 (8th Cir. 1981) (footnote omitted). Accord, State of Tennessee v. Louisville and Nashville R. Co., 478 F.Supp. 199, 202 (M.D.Tenn. 1979), aff'd mem., 652 F.2d 59 (6th Cir.), cert. denied, 454 U.S. 834 (1981).

This legislative history of § 306 is important to a proper construction of § 1513(d). Only by ascertaining Congressional intention may a court give effect to the legislative will. Watt v. Alaska, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."); United States v. American Trucking Associations, Inc., 310 U.S. 534, 542 (1940).

In passing § 1513(d), Congress sought to achieve the same result it had achieved in passing § 306. As with § 306, Congress intended to prohibit property classification systems which would discriminate against airline personal property.

The literal interpretation of § 1513(d) advanced by the appellees and embraced by the Court below ignores Congress' intent to limit exclusions from the comparison class of property to types of property traditionally exempted from taxation, such as church or charitable property.

Rather than advance the usefulness of § 1513(d), the literal approach adopted by the court below serves to undermine the fundamental purpose of the legislation, to prohibit discriminatory

tax treatment and, in fact, it led the South Dakota Supreme Court to the absurd result of allowing "absolute" discrimination. That the situation at bar was unforeseen by Congress when it passed § 1513(d) does not prevent the statute from being applied in a manner consistent with its purpose. Browder v. United States, 312 U.S. 335, 339-40 (1940). To do otherwise would make the passage of § 1513(d) a futile act.

CONCLUSION

In this statutory construction case, the language of 49 U.S.C. § 1513(d) clearly illuminates Congress' intention to prohibit discriminatory taxation of airline personal property by states and municpalities. The purpose of this provision is confirmed by the legislative

history. For this reason and the reasons stated hereinabove, South Dakota's tax on airline flight property discriminates against airline personal property moving in interstate commerce in violation of § 1513(d). The judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted

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No. 85-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIRLINES, INC.;
REPUBLIC AIRLINES, INC.;
FRONTIER AIRLINES, INC.; and
OZARK AIRLINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE
STATE OF SOUTH DAKOTA, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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BRIEF OF AMICI CURIAE RAILWAY PROGRESS INSTITUTE AND ASSOCIATION OF AMERICAN RAILROADS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

A. Introduction

Amici curiae, The Railway Progress Institute (RPI) and the Association of American Railroads (AAR), are voluntary, unincorporated, non-profit associations of companies that are closely connected with the railroad industry and that have a common interest in maintaining a strong national rail transportation system.[1] RPI is comprised primarily of companies that manufacture and supply railroad and high-speed rail equipment or that furnish fleets of specialty railroad cars for use in interstate commerce. AAR is comprised exclusively of interstate carriers by rail; AAR members incur approximately 92 percent of the linehaul mileage, employ about 94 percent of the railroad workers, and generate about 97 percent of the revenue of all railroads operating in the United States. Both RPI and AAR represent their members in matters of common concern before federal agencies and courts.

This case raises an important issue of statutory construction regarding the meaning of an amendment to the Federal Aviation Act of 1958, Pub. L. No. 97-248, §532, 96 Stat. 701-702 (Sept. 3, 1982), 49 U.S.C. §1513(d) ("Section 1513"), which prohibits discriminatory state taxation of "air carrier transportation property." The precise question presented is whether South Dakota has violated Section 1513(d)(1)(A) by subjecting "air carrier transportation property" to ad valorem taxation while exempting virtually all other types of business personalty.

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[1] RPI members are listed in Appendix A to this brief; AAR members are listed in Appendix B to this brief. The Amici appear by consent of the parties.

Although the members of RPI and AAR are not entitled to the protections of Section 1513, many of the Associations' members are beneficiaries of nearly identical federal legislation which prohibits state tax discrimination against "rail transportation property," Section 306(1)(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), recodified at 49 U.S.C. §11503 ("Section 11503").[2] Since resolution of the statutory interpretation issue in this case may affect the interpretation and efficacy of Section 11503, RPI and AAR members have a substantial interest in the outcome of this litigation. RPI and AAR support the common-sense interpretation of Section 1513 advocated by the airlines and accepted by the dissenting judge of the South Dakota Supreme Court. Only the airlines' construction is consistent with the purpose of Section 1513 and will fully accomplish Congress' remedial objectives.

B. Relationship Between Section 1513 and Section 11503

1. Statutory Language

The statute at issue in this case, Section 1513(d)(1)(A), prohibits discriminatory state taxation of "air carrier transportation property" in the following terms:

> (d) *Burdensome and discriminatory acts.*
> (1) The following acts unreasonably burden

[2] The recodification of Title 49 in 1978 substantially altered the language of Section 306. However, such changes were not intended to affect the substantive meaning of the Act. *See,* The Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, §3, 92 Stat. 1466 (Oct. 17, 1978). For the Court's convenience the language of Section 306 is reproduced in Appendix C to this brief.

> and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

The purpose of Section 1513 is to "[make] current law which prohibits the assessment, levying or collecting of taxes on motor carier property in a manner different from that of other commercial and industrial property, applicable to air carriers." H. Conf. Rep. No. 97-760, 97th Cong., 2d Sess. (Aug. 17, 1982), *reprinted in* 1982 U. S. Code Cong. & Ad. News 1190, 1484.

As befits this purpose, the language of Section 1513 is patterned after, and derived from, the language of the Motor Carrier Act of 1980, Pub. L. No. 96-296, §26(a)(1), 94 Stat. 823 (Jul. 1, 1980), 49 U.S.C. §11503a(b)(1) ("Motor Carrier Act"), which states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or a subdivision of a State may not do any of them:

> (1) Assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

The prohibitions of the Motor Carrier Act are "intended to apply to [state] taxes such as those on real or personal property, general sales taxes, or other levies that are parts of general tax structure applicable to a variety of commodities, operations, and commercial activities." H. R. Rep. No. 96-1069, 96th Cong., 2d Sess. 45 (1980), *reprinted in* 1980 U. S. Code Cong. & Ad. News, Legislative History, 2327.

The Motor Carrier Act is, in turn, based upon the language of Section 306(1)(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 which, as recodified in Section 11503(b)(1), states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce. and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market

> value of the other commercial and industrial property.

Under Section 1513(d)(2)(c), "air carrier transportation property" is defined to mean "property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation." "Commercial and industrial property," the class of property with which assessments of air carrier transportation property must be compared under Section 1513, is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." Section 1513(d)(2)(D).

Like the substantive provisions of Section 1513, the definitional terms of Section 1513 are based upon the language of Section 11503 and the Motor Carrier Act. Sections 11503(a)(3) and (4) define "rail transportation property" and "commercial and industrial property"as follows:

> (3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under [the Interstate Commerce Act].
>
> (4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

The Motor Carrier Act defines "motor carrier transportation property" and "commercial and industrial property" in precisely the same terms. 49 U.S.C. §11503a(d)(1)(4).[3]

Section 1513 and the Motor Carrier Act plainly share the same statutory antecedent: Section 11503. The legislative history of Section 11503 is, therefore, indicative of Congress' objectives in enacting Section 1513.

2. Legislative History

In 1961, a Special Study Group on Transportation Policies in the United States (established by Senate Resolution) concluded that discriminatory state taxation of railroad and pipeline property imposed an undue burden on interstate commerce. *See* S. Rep. No. 445, 87th Cong., 1st Sess. (1961) (the "Doyle Report"). This Study Group recommended passage of federal legislation to exempt railroad and pipeline right-of-way from state taxation or, as an alternative, to forbid the discriminatory assessment of property owned or used by interstate carriers. Doyle Report, pp. 463, 465. Concurrently with the issuance of the Doyle Report, bills were introduced in Congress that would have accomplished the latter objective. *See* H.

[3] As originally enacted, the Motor Carrier Act limited the definition of "motor carrier transportation property" to property owned or used by "motor carrier[s] of *property* providing transportation in interstate commerce." [Emphasis added.] 94 Stat. 823. However, the Bus Regulatory Reform Act of 1982 amended the Motor Carrier Act to delete the words "of property" from the definition of "motor carrier transportation property" and thereby extended the protections of the Act to bus lines. *See* Pub. L. No. 97-261, §20, 96 Stat. 1122 (Sept. 20, 1982).

R. 742, 87th Cong., 1st Sess. (1961); H. R. 7497, 87th Cong., 1st Sess. (1961).

Over the next fifteen years, Congress considered a series of legislative proposals that would have forbidden state tax discrimination, not only against railroads and pipelines, but against *all* common and contract carriers regulated by the Interstate Commerce Commission (i.e., rail carriers, express carriers, pipeline carriers, motor common and contract carriers, water common and contract carriers, and freight forwarders).[4] Congressional committees conducted extensive hearings on many of these proposals[5] and concluded that: (i) state tax discrimination against surface transportation property was pervasive and constituted an undue burden on interstate commerce; (ii) state laws which guaranteed equitable tax treatment for interstate carriers had not been observed; and (iii) state administrative and judicial remedies had not af-

[4] *See, e.g.*, H. R. 736, 88th Cong., 1st Sess. (1963); H. R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong. 2d Sess. (1966); H. R. 1489, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. 3945, 92d Cong., 2d. Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973); H. R. 5385, 93d Cong., 2d Sess. (1974); S. 2841, 94th Cong., 1st sess. (1975); S. 2718, 94th Cong., 1st Sess. (1975).

[5] See, *e.g.*, *Hearing on H. R. 736 and H.R 10169 Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); *Hearings on H. R. 4972 and Identical Bills Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966); *Hearings on S. 927 Before the Subcomittee on Surface Transportation of the House Committee on Commerce*, 90th Cong., 1st Sess. (1967); *Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. (1969).

forded interstate carriers an efficient and effective means of obtaining relief from discriminatory state taxation.[6] These committees recommended that Congress establish a clear federal policy against discriminatory state taxation of transportation property and create an efficient federal judicial remedy to enforce that policy against the states.[7]

In late 1975 and early 1976, during the course of congressional debates that led to the passage of Section 11503, Senate and House conference committees restricted the class of interstate carriers that would be entitled to federal protection from discriminatory state taxation solely to interstate carriers by rail.[8] This was accomplished by changing the proposed statutory definition of "transportation property" from "property . . . which is owned or used by a common or contract carrier subject to economic regulation under Part I, II, III or IV of [the Interstate Commerce Act]" to "property, as defined in the regulations of the [Interstate Commerce] Commission, owned or used by a carrier by railroad subject to this part." *Compare,* S. 2718, 94th Cong. 1st Sess. (1975) *with* H. R. 10979, 94th Cong., 1st Sess. (1975).

By enacting Section 11503, Congress intended to prohibit discriminatory state taxation of the railroad industry "in any form whatsoever." *Ogilvie v. State*

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[6] *See, e.g.,* S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); S. Rep. No. 92-1085, 92d Cong., 2d. Sess. (1972); H. R. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974).

[7] *Id.*

[8] *See* S. Rep. No. 94-585, 94th Cong., 1st Sess. 138-39 (1975); H. R. Rep. No. 94-781, 94th Cong., 2d Sess. 166 (1976).

Board of Equalization of the State of North Dakota, 492 F. Supp. 446 (D. N.D. 1980) *aff'd,* 657 F.2d 204, 210 (8th Cir.) *cert. denied.* 454 U. S. 1086 (1981). By enacting Section 1513, Congress plainly intended to extend to air carriers essentially the same federal protections that had been extended previously to other instrumentalities of interstate commerce.[9] Since the congressional purposes underlying Section 1513, Section 11503 and the Motor Carrier Act are coincident, the judicial interpretation given Section 1513 should be harmonized with the interpretation given Section 11503 and the Motor Carrier Act.

C. Discrimination Against Air Carrier Transportation Property In South Dakota

In South Dakota, airline "flight property" (and the property of selected public utilities) is valued and assessed for ad valorem tax purposes by a central state agency, the South Dakota Department of Revenue. By contrast, the business personal property of non-utility taxpayers in South Dakota ("locally-assessed" taxpayers) is exempt from taxation.

Defined under South Dakota law as "all aircraft fully equipped ready for flight used in interstate commerce," "flight property" is exclusively personal and is indisputably "air carrier transportation personal property" within the meaning of Section 1513. Thus,

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[9] The Motor Carrier Act differs from Section 11503 only in that it does not contain any language similar to Section 11503(b)(4), which specifically prohibits, *inter alia,* the imposition of discriminatory state taxes other than property taxes. Section 1513 differs from Section 11503 in that it does not contain any language similar to Section 11503(b)(4), or expressly confer jurisdiction upon federal district courts to hear airline complaints of discrimination.

while air transportation personalty in South Dakota is taxed at levels as high as 60% of market value, most "commercial and industrial"personal property in the state is exempt. This is the discrimination of which the airlines complain.

SUMMARY OF ARGUMENT

The purpose of Section 1513 is to guarantee air carriers equitable state tax treatment vis-a-vis other business taxpayers. Section 1513(d)(1)(A) requires South Dakota to assess air carrier transportation property for ad valorem tax purposes at the same ratio of assessed value to true market value at which all other "commercial and industrial property" within the state is assessed. Although section 1513 defines "commercial and industrial property" as "property devoted to a commercial and industrial use and subject to a property tax levy," major classes of business personalty that are exempt under state law must be taken into account when computing the overall level of assessment of "commercial and industrial property." To hold otherwise would permit states, such as South Dakota in this case, to classify business property by exemption and to effectively impose property taxes solely upon the personalty of air carriers.

The qualifying language, "subject to a property tax levy," as it appears in the definition of commercial and industrial property was intended by Congress to exclude from the class of "commercial and industrial property" only traditionally exempt property, such as churches, charitable institutions, homesteads and the like. South Dakota must, therefore, equalize its assessments of air carrier transportation property at a level which takes into account the total exemption of

business personalty owned by locally-assessed taxpayers in the state.

ARGUMENT

"Commercial and industrial property" is defined for purposes of Section 1513 as property devoted to a business use and "subject to a property tax levy." Reasoning that exempt business personalty is not "subject to a property tax levy," the South Dakota Supreme Court held that such property is not "commercial and industrial property" within the meaning of Section 1513(d)(2)(D). The Supreme Court concluded that Section 1513 affords the airlines no relief from discrimination that arises from the total exemption of personal property which is devoted to a business use and which is owned by locally-assessed taxpayers. In so holding, the South Dakota Supreme Court relied primarily upon language from the district court's opinion in *Ogilvie v. State Board of Equalization of the State of North Dakota,* 492 F. Supp. 446 (D. N.D. 1980), *aff'd,* 651 F.2d 204 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981).

In *Ogilvie,* interstate railroads contended that, where the personal property of locally-assessed business taxpayers is exempt from taxation, the imposition of a state ad valorem tax upon the personal property of railroads and other centrally-assessed business taxpayers constitutes a violation of Section 11503(b)(1). Because locally-assessed business personal property is exempt from taxation in North Dakota and not technically "subject to a property tax levy," the North Dakota district court reasoned (as did the South Dakota Supreme Court here) that Section 11503(b)(1) did not authorize a reduction in the level

of assessment of railroad personalty to the "zero" assessment level applicable to the personal property of locally-assessed taxpayers. 492 F. Supp. at 453-54. However, the district court observed that Section 11503(b)(4) forbids the imposition of "another tax [i.e., a tax in addition to, or other than, a property tax that violates Section 11503(b)(1), (2) or (3)] that discriminates against a rail carrier providing transportation under [the Interstate Commerce Act]."[10] The court held that the "another discriminatory tax" language of Section 11503(b)(4), rather than the "assessment" language of Section 11503(b)(1), encompasses and prohibits discrimination which arises from the exemption of personalty owned by locally-assessed business taxpayers.

On appeal, the Eighth Circuit affirmed the district court's holding that Section 11503 was intended to prohibit tax discrimination against rail transportation property in any form whatsoever and that North Dakota could not, therefore, tax railroad personalty. 657 F.2d at 210. The Eighth Circuit did not, however, specifically address the question of whether Section 11503(b)(1) also prohibited North Dakota from taxing

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[10] Cases which hold that Section 11503(b)(4) prohibits all forms of discriminatory state taxation of the railroad industry include: *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir. 1985) ("loaded-mile" tax); *Richmond, Fredericksburg & Potomac R. R. v. Dept. of Taxation*, 762 F.2d 375 (4th Cir. 1985) (income tax); *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (license tax); *Atchison, Topeka & Santa Fe R. R. v. Bair*, 338 N.W.2d 338 (Iowa 1983) (diesel fuel tax). As noted previously, fn. 9, *supra*, the "another discriminatory tax" provision of Section 11503(b)(4) is not included in either Section 1513 or the Motor Carrier Act.

railroad personalty while exempting other business personalty.

Although the result in *Ogilvie* was correct, the North Dakota district court's observations concerning the definition of "commercial and industrial property" and the scope of Section 11503(b)(1) are erroneous and, if applied to Section 1513 (and the Motor Carrier Act), produce absurd results. Presumably, the South Dakota Supreme Court would concede that, if business personalty *were* "subject to a property tax levy" and assessed at some rate lower than that applicable to airline personal property, Section 1513 would require South Dakota to include locally-assessed personalty in computing an average assessment ratio for commercial and industrial property. Indeed, under the plain language of Section 1513, and under the federal decisions that have interpreted Section 11503(b)(1),[11] the South Dakota Supreme Court must hold that the state would be in violation of Section 1513 if business personalty in the state were subject to taxation at a ratio of, say, only .0005% and air carrier transportation personalty were assessed at 60%. Therefore, it is illogical for the South Dakota Supreme Court to hold that, because business personalty is not subject to *any* tax in South Dakota and discrimination against air carrier transportation personalty is absolute, the airlines are entitled to no relief under Section 1513. In *Northwest Airlines, Inc. v. State Board of Equalization*, 258 N.W.2d 515 (N.D. 1984), the North Dakota Supreme Court perceived this flaw in the *Ogilvie* analysis and held that, even in the absence of a pro-

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[11] *See, e.g., Clinchfield R. R. v. Lynch*, 527 F. Supp. 784 (E.D. N.C. 1981) *aff'd*, 700 F.2d 126 (4th Cir. 1983).

vision similar to Section 11503(b)(4), Section 1513(d)(1)(A) prohibits North Dakota from taxing airline personalty while exempting other business personalty.

Rail car companies that operate in Florida are now faced with precisely the same sort of discrimination that face the airlines here. Prior to the 1982 tax year, 90% of the value of manufacturing inventories, and 99% of the value of all other business inventories, were exempt from ad valorem taxation in Florida. For the 1980 and 1981 tax years, Trailer Train Company (a rail car company and a member of RPI) filed suit under Section 11503 and obtained a federal court order directing the Florida Department of Revenue to take into account the 10% and 1% assessment levels of manufacturing and business inventories when calculating the overall level of assessment of "commercial and industrial" property throughout the state. *See Trailer Train Co. v. Dept. of Revenue,* No. TCA 81-0772 (N.D. Fla. May 10, 1985). The Florida Department of Revenue complied with the federal court order and equalized Trailer Train's assessment at an average level of assessment which reflected the mathematical effect of partially exempting locally-assessed business personalty. However, effective January 1, 1982, Florida *totally* exempted *all* business inventories from ad valorem taxation. In making its calculation of the average level of assessment of commercial and industrial property for the 1982 tax year, the Florida Department of Revenue refused to account for the effect of totally exempt business inventories upon the overall level of assessment of business personalty in the state. Paradoxically, the average level of assessment of "commercial and industrial property" as computed by the Department for the 1982 tax year *increased* over the prior years in which business inventories were partially subject to taxation. As a consequence, notwithstanding increased discrimination against Trailer Train resulting from the total exemption of a major class of locally-assessed business personalty, Trailer Train's tax liability for the 1982 tax year increased over 1980 and 1981. [This matter is now the subject of pending litigation in *Trailer Train Company v. Department of Revenue, State of Florida, et al.,* No. TCH 82-1066 (N.D. Fla. filed Oct. 1, 1982) a case in which the Department is advancing essentially the same arguments advocated by South Dakota in this case.]

In *Arkansas Best Freight System, Inc. v. Cochran,* 546 F. Supp. 915 (M.D. Tenn. 1981), the district court properly interpreted the Motor Carrier Act to prohibit discrimination against motor carrier property resulting from the exemption of "commercial and industrial" personalty owned by locally-assessed taxpayers in Tennessee. In 1978, the Tennessee legislature authorized the governing body of each county to direct local assessors to "presume" that locally-assessed business personalty had no value. *See* Chapter 902, 1978 Tennessee Public Act, §§1-4, T.C.A. §67-5-216(b) (deleted by Chapter 793, 1984 Tennessee Public Acts, §1). Numerous Tennessee counties adopted this presumption by resolution and discontinued the assessment of locally-assessed business personalty. In 1981, various motor carriers filed suit under the Motor Carrier Act challenging Tennessee's personal property exemption scheme. Rejecting Tennessee's argument that the Motor Carrier Act did not interfere with the state's power to classify property for purposes of ad

valorem taxation, the district court ordered a refund of the carriers' personal property taxes "because the failure to tax other commercial and industrial tangible personal property pursuant to the presumption of Tenn. Code Ann. [67-5-216(b)] violates the provisions of the Motor Carrier Act of 1980." 546 F. Supp. at 919. As noted previously, the substantive language of the Motor Carrier Act is identical to Section 1513(d)(1)(A); Section 1513 should also be interpreted, therefore, to prohibit discrimination resulting from the exemption of business personalty in South Dakota.

In this case, the South Dakota Supreme Court has interpreted the phrase "subject to a property tax levy" without reference to the legislative history, or to the purpose, of Section 1513. By limiting the definition of commercial and industrial property to "property subject to a property tax levy," Congress merely intended to exclude from that definition property which had been exempt *traditionally* under state law, such as "churches, charitable institutions, homesteads, and the like." [*See* S. Rep. No. 91-630, 91st Cong., 2d Sess., 11 (1969), which explains the reasons for the "subject to a property tax" limitation in the definition of "commercial and industrial property" under the Section 11503.] Congress did not intend to exclude from the comparison class personal property devoted to a commercial use, or to sanction state classification schemes which subject air carrier transportation personalty to taxation, but which do not tax other types of commercial and industrial personalty.

By enacting Section 1513, Congress intended to eliminate both *de jure* tax discrimination against air carrier transportation property (i.e., discrimination resulting from state constitutional or statutory provi-

sions that separately classify rail transportation property for taxation), and *de facto* state tax discrimination against air carrier transportation property (i.e., discrimination or classification resulting from different valuation or assessment practices). *Ogilvie*, 657 F.2d at 210. In fashioning Section 11503, Congress specifically rejected bills that would have permitted certain states, such as Tennessee, to enforce state constitutional provisions that separately classified transportaion property under state law for taxation at rates (or assessment percentages) different from those applicable to other property. *See* S. Rep. No. 94-585, 94th. Cong., 1st Sess. 138-39 (1975); H. R. Rep. No. 94-781, 94th Cong., 2d Sess. 166 (1976). *See also* Cong. Rec. S-21078 (daily ed., Dec. 4, 1975) (Amendment offered by Senator Howard Baker); Cong. Rec. H-12815 (daily ed., Dec. 17, 1975) (Remarks of Rep. Robin Beard); Cong. Rec. H-12816 (daily ed., Dec. 17, 1975); (Remarks of Rep. Brock Adams). As stated by the Eleventh Circuit in *Alabama Great Southern Ry. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) with respect to Section 11503:

> Until this law was passed, . . . states could constitutionally classify railroads differently from all other taxpayers for the imposition of state taxes without violating the equal protection clause of the Fourteenth Amendment. It was the obvious purpose of Congress to put an end to this practice, where such treatment of the railroads as a class was discriminatory in effect.

The same purpose underlies Section 1513.

It should also be emphasized that many of the anti-discrimination bills antecedent to Section 11503, *e.g.*,

S. 927 and S. 2289, required a comparison between the assessment ratio applicable to "transportation property" and the assessment ratio applicable to *"all other property"* in the taxing district or assessment jurisdiction.[12] [Emphasis added.] Amendments to these bills, the language of which was incorporated into Section 11503 as enacted, limited the comparison class to "commercial and industrial property." As explained by the sponsors of these amendments, the change from "all other property" to "commercial and industrial property" was intended to permit states some latitute in classifying property *"unrelated* to commercial or industrial use."[13][Emphasis added.]

This legislative history clearly demonstrates that, while states may continue to classify property by type, i.e. to classify between "real" and "personal" property, or between "tangible" and "intangible" property for purposes of taxation, state *use* classifications which treat air and rail transportation property less favorably than other property devoted to a business or economic purpose are forbidden. *State of Arizona v. Atchison, Topeka & Santa Fe R. R.*, 656 F. 2d 398 (9th Cir. 1981); *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *State of Tennessee v. Louisville & Nashville R. R.*, 478 F. Supp. 199 (M.D. Tenn. 1979); S. Rep. No. 1483, 90th Cong., 2d Sess. 7 (1968).[14] The only *use* classes of

[12] S. 927, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969).

[13] 116 Cong. Rec. 2023 (1970)

[14] The legislative history of Section 11503 manifests a plain intention on the part of Congress *not* to interfere with classification by *type of property*, (e.g., real/personal, tangible/intangible) so long as railroad realty and personalty are treated in the same manner as commercial and industrial real and personal property. *Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st. Cong., 1st Sess. 46-47 (Jul. 1964) (Colloquy between Senator Vance Hartke and Phillip Lanier); *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 82 (1967) (Statement of James Ogden). A similar intention to permit classification among real, personal, and intangible property explains the use of language in Section 1513(d)(1)(A), which speaks of a comparison between airline property (comprised largely of personal property) and "commercial and industrial property of *the same type.*"

business property that are specifically excluded from the comparison class of "commercial and industrial property" under Section 11503, Section 1513 and the Motor Carrier Act (and for which states may continue favorable tax treatment) are agricultural land and timber-producing land. *See* Section 11503(a)(4); Section 1513(d)(2)(C).

Taxing air carrier transportation personalty while exempting the personalty of other business taxpayers is the ultimate form of use-class discrimination against owners of airline property. If states are free to classify by exemption, and to narrow or limit the class of commercial and industrial property with which airline property is to be compared, states are free to shift a major portion of the ad valorem tax burden to the airline industry (and to other instrumentalities of interstate commerce now protected by federal legislation).[15]

[15] In *ACF Industries Incorporated v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983), carlines challenged Arizona's statutory formula for computing the average assessment ratio applicable

Since the early 1960's, an increasing number of states have established complete or partial exemptions for major classes of locally-assessed business personalty, while the personalty of centrally-assessed interstate carriers and public utilities has generally remained subject to tax. *See* Netzer, *Personal Property Taxation in the United States,* The Urban Research Center of New York University (1985); Netzer, *Economics of the Property Tax,* Brookings Institution (1966). Between 1959 and 1984, the number of states taxing non-farm machinery and equipment decreased from 47 to 40; the number of states taxing business inventories decreased from 46 to 20; and the number of states taxing agricultural personalty decreased from 42 to 17. *Personal Property Taxation in the United States, Table 1.* The inevitable effect of such exemptions is to narrow the personal property tax base and to shift the burden of the property tax to those, such as the airlines in this case, whose property remains

to "commercial and industrial" property throughout the state. The carlines contended that the language of Section 11503 required Arizona to include exempt business inventories in its calculation of the overall commercial and industrial assessment level. The Ninth Circuit blithely rejected this contention without any analysis or citation to authority. 714 F.2d at 94. Taken to a logical end, the decision in *ACF Industries* would permit states to exempt with impunity all business property except rail transportation property. The Amici here respectfully submit that *ACF Industries* is simply irreconcilable with Congress' plain intention to forbid classification schemes that discriminate against owners and users of rail transportation property. [For the same reasons, the district court's refusal in *Trailer Train Co. v. State Board of Equalization,* 538 F. Supp. 509 (N.D. Cal. 1982) to grant relief under Section 11503(b)(1) from "exemption discrimination" is unwarranted.]

subject to tax. This is, of course, antithetical to Congress' purposes in enacting Section 1513.[16]

Federal courts have held that the remedial provisions of Section 11503 must not be interpreted so narrowly, nor so literally, as to defeat Congress' obvious intent and to produce absurd results. *Trailer Train Co. v. State Board of Equalization,* 697 F.2d 860, 865 (9th Cir. 1983). The same rule must be applied to Section 1513. *Northwest Airlines, supra.* Section 1513 expressly prohibits the assessment of air carrier transportation property at a higher assessment ratio than that applicable to commercial and industrial property in the same assessment jurisdiction. To the extent that locally-assessed business personalty is exempt from taxation, the ratio of assessed value to true market value of such property is plainly zero.[17] By contrast, air transportation personal property is assessed in South Dakota at up to 60% of its full cash value. No clearer case of discriminatory

[16] It should be noted that many of the states which now exempt major classes of business personalty, including the State of South Dakota, established such exemptions only after Congress enacted Section 11503.

[17] Computing the *de jure* level of assessment of commercial and industrial personal property in a state where locally-assessed personalty is totally or partially exempt is not complex. The average *de jure* level of assessment of commercial and industrial personalty can be determined by: (i) using various state data, or Census Bureau data, to estimate the total market value of exempt classes of business personalty within the state; (ii) aggregating the market values of exempt personalty with the market values of business personalty that is subject to tax; and (iii) dividing the total market value of exempt and non-exempt personalty into the total assessed value for non-exempt personalty only.

treatment is imaginable and Section 1513 must be interpreted to afford air carriers relief.

CONCLUSION

The Amici respectfully submit that: (i) exempt business personalty in South Dakota is "commercial and industrial property" within the meaning and intent of Section 1513; and (ii) the "zero" assessment level of exempt personalty owned by locally-assessed business taxpayers in South Dakota must be taken into account when computing the average assessment ratio for commercial and industrial property. This case should be remanded for a determination of the overall level of assessment of commercial and industrial property in South Dakota for the relevant tax years and for the entry of an appropriate equalization order.

Respectfully submitted,

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APPENDIX

APPENDIX A

MEMBERS OF THE RAILWAY PROGRESS INSTITUTE

Abex Corporation
Accurate Bushing Company
ACF Industries, Incorporated
Alco Spring Industries, Inc.
Allied International Corporation
Alsthom Atlantic, Inc.
Altoona Gear Company of Louisville
American Air Filter Company
American Standard, Inc.
Amstead Industries, Inc.
Apex Railway Products Company
Arrowsmith Industries, Inc.
Asfor Steel Corporation
Bachman Associates
Bethlehem Steel Corporation
Bombadier, Inc.
Brenco, Inc.
Buffalo Brake Beam Company
Burro Crane, Inc.
Camcar/Textron
Canadian Metal Rolling Mills Limited
Canron Corporation
Cardwell Westinghouse
CF&I Steel Corporation
Chicago Freight Car Leasing Company
Chrysler Corporation
CL Rail Trucks, Inc.
Comstock Engineering, Inc.
Dapco Industries
Dayco Corporation
De Leuw, Cather & Company
Dixie Precast, Inc.

Dresser Industries, Inc.
E. I. DuPont de Nemours & Co., Inc.
W. A. Edwards & Associates, Inc.
Emons Industries, Inc.
Evans Products Company
Faiveley Corporation
Farr Company
Ferrostaal Corporation
Fruit Growers Express Company
General American Transportation Corporation
General Electric Company
General Electric Railcar Services Corporation
General Motors Corporation
General Signal Corporation
General Standard Company
GLNX Corporation
Greenville Steel Car Company
The Gregg Company, Ltd.
Gunderson, Inc.
Henkels & McCoy, Inc.
Hennessy Products, Inc.
Hughes Railway Supplies
IEC-Holden, Inc.
International Thomson Transport Press
IRECO, Inc.
Itel Rail Corporation
JMW Settlements, Inc.
Keystone Railway Equipment Company
Knorr Brake Corporation
Koppers Company, Inc.
Lukens General Industries
Maclean-Fogg Company
Mass Transit, Inc.
The Maxson Corporation
McConway & Torley Corporation
Mellon Institute
Merrill Lynch Economics, Inc.

Metro Magazine
Microphor, Inc.
Midland-Ross Corporation
Midwest Electronic Industries, Inc.
Henry Miller Spring & Manufacturing Company
Miner Enterprises, Inc.
M. B. Mitchell & Associates, Inc.
Modern Railroads
Monogram Industries
Morton Manufacturing Company
New York Air Brake Company
North American Car Corporation
Ogontz Corporation
The Ohio Brass Company
The Okonite Company
Omark Industries
OMNI Rubber Products, Inc.
Harry F. Ortlip Company
Park Rubber Company
Pettibone Corporation
Maurice Pincoffs Co., Inc.
Pittsburgh Spring, Inc.
Pohl Corporation
Portec, Inc.
Power Parts Company
Proform, Inc.
Progressive Railroading
PTJ Publishing, Inc.
Pullman Leasing Company
Pullman Technology, Inc.
Pulse Electronics, Inc.
Racine Railroad Products, Inc.
Rail Bearing Service, Inc.
Railway Age
Railway Development Corporation
Richmond Tank Car Company
Rockwell International Corporation

SAB Ajax
SAB Harmon Industries, Inc.
Safetran Systems Corporation
Schaefer Equipment, Inc.
Norman W. Seip & Associates
SERRMI, INC.
Servo Corporation of America
Sloan Value Company
Smith Valve Corporation
Speno Rail Service Company
Standard Car Truck Company
Stedef, Inc.
Structural Rubber Products Company
A. Stucki Company
Sumimoto Corporation of America
Syro Steel Company
Szarka Enterprises, Inc.
Teleweld, Inc.
Temco Corporation
Temco Corporation
The TGV Company
Thrall Car Manufacturing Company
The Timken Company
Touchstone Railway Supply & Manufacturing Company
Trailer Train Company
Transamerica Transportation Services, Inc.
Transit America Inc.
Transportation Technology
TransTech, Inc.
Union Carbide Corporation
Union Tank Car Company
Unit rail Anchor Company
United States Rail Services, Inc.
Unity Railway Supply Co., Inc.
UTDC (USA), Inc.
Vapor Corporation
Vulcan Materials Company

Westcode, Incorporated
Western-Cullen-Hayes
Westinghouse Electric Corporation
Wheeling-Pittsburgh Steel Corporation
The Youngstown Steel Door Company

APPENDIX B

Members of the Association of American Railroads

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company

Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company

Canadian Pacific Limited
    Canadian Pacific Lines in Maine
    Canadian Pacific Lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Colorado & Southern Railway
Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway

Galveston, Houston & Henderson Railroad Company

Grand Trunk Corporation—and other ines in the U.S. indirectly controlled by the Canadian National Railways
    Grand Trunk Western Railroad Company
    Detroit, Toledo & Ironton Railroad Company
    Central Vermont Railway, Inc.
    Duluth, Winnepeg & Pacific Railway, Inc.

    Canadian National Railways:
        Lines in Michigan
        Lines in New England
        Lines in New York
        Lines in Vermont
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company
Illinois Central Gulf Railroad Company
    Chicago & Illinois Western Railroad Company
    Waterloo Railroad

Kansas City Southern Railway Company
    Arkansas & Western Railway Company
    Fort Smith & Van Buren Railway Company
    Kansas & Missouri Railway & Terminal Company
Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisiana & Arkansas Railway Company

McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
    Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
    Brownville & Matamoras Bridge Terminal Company

Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford, Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
Chesapeake Western Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company
Peoria & Pekin Union Railroad Company
Pittsburgh & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern & Potomac Railraod Company
Seaboard System Railroad, Inc.
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
Visalia Electric Railroad Company
Southern Railway System
Alabama Great Southern Railroad Company
Algers, Winslow & Western Railway Company
Atlantic & East Carolina Railway Company
Camp Lejeune Railway Company
Carolina and Northwestern Railway Company
Central of Georgia Railroad Company

Cincinnati, New Orleans & Texas Pacific Railway Company
Georgia Northern Railway Company
Georgia Southern & Florida Railway Corporation
Interstate Railroad Company
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Texas Mexican Railway Company

Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Denton Railroad

APPENDIX C

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976

Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatement of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of

any State, the district courts of the United States shall have jurisdiction, without regard to amount of controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to th true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation prop-

erty at a value which bears a higher ratio to the true market value of such transportation proprty than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transprotation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

No. 85-732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; and OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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APPELLANTS' SUPPLEMENTAL BRIEF

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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APPELLANTS' SUPPLEMENTAL BRIEF

This brief responds to the Court's November 17, 1986, Order directing the parties to file briefs addressing whether South Dakota's flight property tax, S.D. Codified Laws Ann. ch. 10-29 (1982), could be imposed under 49 U.S.C. § 1513(d)(3) as an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and whether the resolution of that issue is a question of state or of federal law.[1] It is appellants' position that the

[1] Both parties explicitly limited the "question presented" to the meaning of the phrase "subject to a property tax levy" found in

issue is a question of both federal and state law, and that the tax is not an "in lieu tax."

I. WHETHER SOUTH DAKOTA'S FLIGHT PROPERTY TAX IS AN "IN LIEU TAX" WITHIN THE MEANING OF 49 U.S.C. § 1513(d)(3) IS A QUESTION OF BOTH FEDERAL AND STATE LAW.

Although a state court interpretation of the effect of a state's own laws is entitled to great deference, this Court's decisions demonstrate that what constitutes an "in lieu tax" within the meaning of § 1513(d)(3) ultimately is a federal question. In *Chase Manhattan Bank, N.A. v. Finance Administration*, 440 U.S. 447 (1979), for example, the Court reviewed and reversed a determination by the New York Court of Appeals that a rent and occupancy tax was a "tax on tangible personal property" within the meaning of Pub. L. No. 91-156, 83 Stat. 434 (1969). In so doing, the Court specifically described the inquiry to be "a question of federal law." *Id.* at 449. In *City of New York v. Feiring*, 313 U.S. 283, 285 (1941), the Court similarly held that whether a seller's obligation to pay state sales taxes collected from its customers was a "tax" within the meaning of section 64 of the Bankruptcy Act, 52 Stat. 840, 874 (1938) (current version at 11 U.S.C. § 507 (1979 & Supp. 1986)), was a federal question.

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§ 1513(d)(2)(D)'s definition of "commercial and industrial property." Juris. Statement i; Motion to Dismiss or Affirm i. Consideration of the "in lieu" issue appears inconsistent with the Court's usual practice of not reviewing an issue not raised by the jurisdictional statement or fairly included therein unless the state court decision appealed from evinces a plain error which may "seriously affect the fairness, integrity or public reputation of public proceedings." R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE, § 6.26 at 365 (6th ed. 1986), *quoting* United States v. Atkinson, 297 U.S. 157, 160 (1936). *See also* this Court's Rule 15.1(a) and Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590, 597 n.14, *reh'g denied*, 348 U.S. 852 (1954).

A state's characterization of its law may not be used to disguise its substance and thereby defeat a federally conferred immunity from state taxation. *See First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1968).

Nonetheless, in a case involving asserted immunity from state sales taxes the Court has stated:

> When a state court has made its own definitive determination as to the operating incidence [of a tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive.

American Oil Co. v. Neill, 380 U.S. 451, 455-56 (1965); *accord Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). Whether a particular state tax in fact operates as a substitute for other state taxes largely is a state law inquiry. *See United States v. State Bd. of Equalization*, 639 F.2d 458, 462-63 (9th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981).[2] The South Dakota Supreme Court has determined that the State did not adopt its flight property tax "instead of, or, [as] a substitute for" another *ad valorem* property tax. *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106, 109 (S.D. 1985), *juris. noted, Western Air Lines, Inc. v. Bd. of Equalization*, 106 S.Ct. 1180 (1986). This construction by the State's highest court of the State's own tax law "is consistent with the statute's reasonable interpretation,"

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[2] The court stated, "[t]he teachings of *First Agricultural* and *Chase Manhattan*—that a federal test must be used to determine the incidence and type of a state tax for federal purposes—do not preclude consideration of state law to determine if California's bank franchise tax was imposed in lieu of the sales tax on sales to national banks." *Id.* at 463. *See also* State of Alabama v. King & Boozer, 314 U.S. 1, 9-10 (1941) ("Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority.")

American Oil, *supra* at 455, and thus should remain undisturbed.

II. THE SOUTH DAKOTA FLIGHT PROPERTY TAX IS NOT AN "IN LIEU TAX" UNDER 49 U.S.C. § 1513(d)(3).

Summary: An "in lieu tax" is one that directly substitutes for a tax which would otherwise apply. The existence of an "in lieu" relationship between two taxes is determined from evidence of whether the legislature intended to, and did, effect a *bona fide* substitution of taxes. This is the concept of "in lieu tax" that is incorporated in § 1513(d)(3), as indicated by the overall statutory purpose, the cases dealing with "in lieu" taxes and by evidence showing that Congress specifically intended to protect the Minnesota flight property tax, the only state tax at that time which conformed to the dual test of § 1513(d)(3). In any event there is no basis for finding the South Dakota flight property tax to be an "in lieu tax." The South Dakota flight property tax is not, and never was, a substitute for the general personal property tax or any other tax.

A. An "In Lieu Tax" Must Be A True Substitute For Another Tax.

The cases and literature treat an "in lieu tax" and a tax "in lieu of" another tax synonymously. The words "in lieu of" mean "in place of" or "in substitution of" or "instead of."[3] Where federal statutes refer to taxes "in lieu of" other taxes, they invariably do so in the sense of a substitution of one tax for another.[4]

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[3] BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[4] For example, 31 U.S.C. § 3124 prohibits taxation of stocks and obligations of the United States Government except for "a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax. . . ." In a technical revision the word "instead" was inserted for "in lieu" for clarity. *See* 31 U.S.C.A. § 3124 (West 1983) (explanatory note). The question of whether a particular Tennessee tax was an "in lieu tax" under the predecessor provision to § 3124 was noted but not decided in Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 396 n.6 (1983).

Section 903 of the Internal Revenue Code, 26 U.S.C. § 903 (1982), extends a foreign tax credit for taxes paid "in lieu of" income and certain profit taxes "generally imposed" by a foreign country. The implementing IRS regulation, Treas. Reg. § 1.903-1(b)(1) (1986), states that a tax may be considered in lieu of an income tax only if it "operates as a tax imposed *in substitution for, and not in addition to*, an income tax . . . otherwise generally imposed." (Emphasis added). The principal inquiry for the courts under § 903 and under its predecessor provision is whether the tax is levied "in place of or instead of or as a substitute for, an existing income or profits tax." *See* Missouri P.R.R. Co. v. United States, 392 F.2d 592, 600-01 (Ct. Cl. 1968); Metropolitan Life Ins. Co. v. United States, 375 F.2d 835, 839 (Ct. Cl. 1967), *citing* United States v. Waterman S.S. Corp., 330 F.2d 128, 131 (5th Cir. 1964), *aff'd on other grounds*, 381 U.S. 252, *reh'g denied*, 382 U.S. 873 (1965).

Prior to December 24, 1969, Congress had allowed state taxation of national banks in four ways if such taxes were "in lieu of" other taxes pursuant to former Rev. Stat. § 5219 (current version at 12 U.S.C. § 548 (1957 & Supp. 1986)), and allowed certain other taxes for a temporary period after that date if the state did not already "impose a tax or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, § 3(b), 83 Stat. 434, 434 (1969); *see* United States v. State Bd. of Equalization, *supra* at 460-61. The Ninth Circuit described such a state tax as an "in lieu tax." *Id.* at 463.

In the laws of the various states, "in lieu" taxes typically are used as a substitute for *ad valorem* property taxes in instances where it is difficult to arrive at a fair property value by the usual means of valuation. Common examples are gross receipts taxes and severance taxes. Cases interpreting these state statutes make clear that an "in lieu tax" must do more than carry the "in lieu" label; it must truly substitute for another tax. The case most directly in point is *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515, 518 (N.D. 1984), upholding a lower court finding that the North Dakota air carrier transportation property tax was not an "in lieu tax" under § 1513(d). The facts there showed that the year after enactment of § 1513(d), the North Dakota

legislature adopted an amendment to the air carrier tax which declared it to be "in lieu of" aircraft registration fees and sales and use taxes.[5] At the same time the legislature adopted amendments purporting to exempt air carriers from registration fees and sales and use taxes.[6] The record, however, showed that the airlines had never been assessed registration fees or sales or use taxes. The trial court opinion clearly explains why these amendments did not create an "in lieu tax" within § 1513(d)(3):

> While Section 57-32-01.1 purports to label the tax in this case as an "in lieu tax," clearly it isn't. There is no other tax that is imposed on airlines. Therefore there is no tax for which this one can be called a substitute or which is instead of another tax.[7]

Similar reasoning was followed in the case below by the South Dakota Supreme Court. It relied upon *Lebeck v. State*, 62 Ariz. 171, 173, 156 P.2d 720, 721 (1945), which refused to enforce a license tax on motor vehicles purportedly imposed "in lieu of all ad valorem property taxes on any vehicle subject to such license tax." The court in *Lebeck* held that, since the plaintiff's vehicles were engaged exclusively in interstate commerce, they were not subject to the *ad valorem* tax in the first place and therefore were not subject to a tax "in lieu of" that tax.[8] *Id.* at 173-74, 156 P.2d at 721.

Federal cases dealing with state "in lieu" taxes also underscore the necessity that the "in lieu tax" function

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[5] N.D. Cent. Code § 57-32-01.1 (1983); 1983 N.D. Laws ch. 592 § 3.

[6] N.D. Cent. Code §§ 57-39.2-04(38) (1983); 57-40.2-04(2) (1983); 2-05-11 (1983).

[7] Northwest Airlines, Inc. v. State Bd. of Equalization, Civ. No. 33697, slip op. at 4 (N.D. Dist. Ct. April 25, 1984), *aff'd*, 358 N.W.2d at 518 (Appendix A).

[8] *Accord* Brush v. State, 59 Ariz. 525, 130 P.2d 506 (1942); *cf.* Lamb v. Milliken, 78 Colo. 564, 567, 243 P. 624, 625 (1926).

as a true substitute. Most such cases deal with challenges under the commerce clause to gross receipts taxes established in lieu of property taxes. In a number of holdings beginning with *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688 (1895), such taxes were sustained if found to be the "just equivalent" of the taxes excused.[9] While the cases in this area of the law do not define the limits of "just equivalent"[10] they do make clear that, to pass constitutional muster, an "in lieu tax" must involve the true substitution of one tax for another rather than the creation of an additional tax. *New Jersey Bell Tel. Co. v.*

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[9] Other cases in this line include: Great N. Ry. Co. v. Minnesota, 278 U.S. 503 (1929); General American Tank Car Corp. v. Day, 270 U.S. 367 (1926); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912).

[10] The early cases reflect a concern that the "in lieu" exaction be no greater than the tax for which it substitutes. *See* Pullman Co. v. Richardson, *supra* at 339 (tax "not claimed to be in excess of what would be legitimate as an ordinary tax on the property . . . nor to be relatively higher than the taxes on other kinds of property"); Cudahy Packing Co., *supra* at 456 (tax "not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value"); Postal Tel. Cable Co., *supra* at 697 (tax "amounts to no more than the ordinary tax upon property, or a just equivalent therefor"). However, in the most recent of the "in lieu" cases, Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959), the Court reiterated the requirement that the "in lieu tax" be the just equivalent of a legally applicable tax but declined to explore the limits of "just equivalence." The Court stated, "[w]hile the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount [*citing* Postal Telegraph] we will not inquire into the exactitudes of the formula where appellant has not shown it would be so baseless as to violate due process." *Id.* at 436. Because of the obsolescence of the doctrine which generated these commerce clause cases (*see* Complete Auto Transit v. Brady, 430 U.S. 274 (1977)) there have been no "in lieu" decisions since *Railway Express*. A requirement of "substantial equivalence" with respect to complementary taxes is still very definitely imposed by the Court. *E.g.*, Maryland v. Louisiana, 451 U.S. 725, 759 (1981); *see infra* n.11.

State Bd. of Taxes and Assessments, 280 U.S. 338, 349 (1930) ("we think it very plain that the exaction is not a tax on property nor in substitution for or 'in lieu of' a property tax"). *See also United States Express Co. v. Minnesota, supra* at 346-48; *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 300-01 (1912); *Galveston H. & S.A. Ry. Co. v. Texas*, 210 U.S. 217, 227-28 (1908).

B. Section 1513(d)(3) Does Not Depart From The Concept Of An "In Lieu Tax" As A True Substitute.

Both the legislative history and statutory scheme show that § 1513(d)(3) contemplates the conventional interpretation of an "in lieu tax" as an actual substitute for another tax. Congress was not using "in lieu" to denote a broader concept of taxes—such as "complementary" taxes—which in some way tend to balance each other. While an "in lieu tax" sometimes is regarded as one kind of complementary tax, "in lieu" taxes comprise a narrower class. Judicial review of complementary taxes generally involves constitutional issues and requires courts to look beyond the confines of the tax at issue to determine whether it discriminates.[11] The issue here, however, involves a *statutory* command against discrimination, a distinction the Court emphasized in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979). In interpreting a

[11] *E.g.*, Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1869). In successful complementary taxes the discrimination is cured by enactment of a second tax—generally applicable to a different class of taxpayers—to balance the discrimination inherent in the first. The court's assignment is to determine whether the imposition of different taxes on different classes of taxpayers achieves the necessary equality of result between interstate and local commerce. *E.g.*, Maryland v. Louisiana, *supra*. *See generally* Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986). In the cases involving "in lieu" taxes the courts have not engaged in broad balancing but have looked at the tax on its own terms to determine whether there is a stated or otherwise clear purpose to substitute the tax for another specific tax applicable to the same taxpayer.

statute the Court "look[s] narrowly to the type of tax the federal statute names, rather than . . . consider the entire tax structure of the state. . . ." 441 U.S. at 149-50. This approach is "to be faithful not only to the language of that statute, but also to the expressed intent of Congress in enacting it." *Id.* This same course has been followed in determining whether state taxes discriminate against railroads in violation of 49 U.S.C. § 11503 (Supp. 1986), the railroad version of § 1513(d). *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *Kansas City S. Ry. Co. v. McNamara*, 624 F. Supp. 395, 401 (M.D. La. 1985); *Alabama G. S. Ry. Co. v. Eagerton*, 541 F. Supp. 1084, 1086 (M.D. Ala 1982). As we show below, the South Dakota flight property tax is not an "in lieu tax" under any reading of the term "in lieu" as used in § 1513(d)(3).

1. Section 1513(d)(3) was intended to protect the Minnesota flight property tax, which is a true substitute tax.

The record below provides evidence of what Congress meant by an "in lieu tax." In the airlines' Reply Brief to the trial court in this case, they referred to and attached an affidavit prepared for a related case by John L. Zorack, an attorney who was involved in the passage of what is now § 1513(d). Mr. Zorack's affidavit (Appendix B) states that § 1513(d)(3):

> was not contained in early drafts of either the Senate or House versions of section [1513(d)] but was inserted at the conference stage . . . to take care of Minnesota's objection to an earlier version. Senator Durenberger and the State of Minnesota submitted the final draft as approved by the conference committee and was needed so that section [1513(d)] would not invalidate the Minnesota airflight property tax, Minn. Ann. Stat. § 270.071-079, which is a true in lieu tax imposed with the consent of the relevant airlines instead of other taxes which would otherwise be levied on airflight property. The lan-

guage was drafted primarily by officials in the Department of Revenue, State of Minnesota, and was agreed to unanimously by the House-Senate Conference Committee.

Other than the Zorack affidavit, nothing appears in the record of this case or the formal legislative history expressly addressing the meaning of "in lieu tax" in § 1513(d)(3). There is, however, no reason to doubt the accuracy of the Zorack affidavit, and its plausibility is confirmed by the research into state "in lieu" taxes in effect at the time of enactment of § 1513(d). This research indicates that the Minnesota statute was the only state law meeting the terms of § 1513(d)(3) when it was enacted in 1982.[12]

The Minnesota flight property tax is plainly an "in lieu tax." It carried out a 1944 amendment to the State's constitution permitting aircraft to be taxed "on a more onerous basis than other personal property . . . in lieu of all other taxes."[13] Prior to adoption of the flight

[12] Several other states had special taxes on airline property which were arguably in lieu of other taxes. *E.g.*, Ariz. Rev. Stat. Ann. § 42-705(b) (West Supp. 1986); Ga. Code Ann. §§ 48-5-541 to 48-5-546 (1982); Miss. Code Ann. §§ 27-35-701 to 27-35-711 (1972); Neb. Rev. Stat. §§ 77-1245 to 77-1250 (1976 & Cum. Supp. 1984); S.C. Code Ann. §§ 12-37-2410 to 12-37-2470 (Law. Co-op. Supp. 1985); Wis. Stat. Ann. §§ 76.01, 76.03, 76.23 (West 1975). There is currently some earmarking of funds in Arizona (beginning in 1986, Ariz. Rev. Stat. Ann. § 42-705(b) (West Supp. 1986)) and Wisconsin (a "transportation fund" covering air and surface transportation, Wis. Stat. Ann. § 25.40(2) (West 1975)). However, none of the above statutes direct that the funds collected from the tax be utilized specifically for airport or aeronautical purposes.

[13] Minn. Const. of 1857, § 4 (1944). As later modified, this portion of Minnesota's constitution now provides:

> The legislature may tax aircraft using the air space overlying the state on a more onerous basis than other personal property. Any such tax on aircraft shall be *in lieu of* all other taxes.

Minn. Restructured Const., Art. X, Sec. 5 (emphasis added).

property tax in 1945, all airline property was subject to general personal property taxes applicable to domiciliary corporations, *cf. Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, *reh'g denied*, 323 U.S. 809 (1944), and those general taxes remained applicable to all real and personal property of airlines "except flight property." Minn. Stat. Ann. § 270.072 (West 1969). Under the flight property tax, aircraft are taxed differently and all proceeds of that tax are placed in a fund for airport and aeronautical purposes under Minn. Stat. Ann. § 270.077 (West 1969). In accordance with the State constitution's "in lieu" requirement, other potentially applicable taxes contain specific exclusions for these aircraft.[14]

If, as indicated, § 1513(d)(3) was intended to protect the Minnesota flight property tax, then other taxes claimed to fall within the "in lieu tax" language of § 1513(d)(3) should reflect a similarly clear legislative intent to be substituted for other taxes. As discussed below, no such legislative intent can be found with respect to the South Dakota flight property tax.

2. *An interpretation of "in lieu tax" as other than a true substitute would not be consistent with the statutory purpose.*

The clear purpose of § 1513(d) is to prohibit tax discrimination against airline property in relation to other business property. Section 1513(d)(3) creates an exception to the prohibition of § 1513(d), but not to its basic purpose. The exception allows for a discriminatory property tax if the impact of such discrimination is mitigated by excusing the airline from other taxes, and such discriminatory taxes are wholly utilized for airport and aeronautical purposes. Obviously, that statutory purpose is not served if an "in lieu tax" can be read to mean a

[14] Aircraft registration taxes, Minn. Stat. Ann. § 360.521 (West 1969 & Cum. Supp. 1987); sales and use taxes, Minn. Stat. Ann. § 297A.25(m) (West 1969).

tax which does not *in fact* substitute for taxes which the airline would otherwise have to pay.[15]

A discriminatory property tax which purported to be "in lieu of" an inapplicable tax—such as gross receipts taxes prohibited by § 1513(a) or a tax which unconstitutionally discriminates against interstate commerce—plainly would not be an "in lieu tax" consistent with the overall scheme of § 1513(d). Neither can it be contended that the term "in lieu tax" should be loosely construed because the true purpose of § 1513(d)(3) is to encourage states to use receipts from airline taxes to build their own airports. Such a notion is not supported by the legislative history of § 1513(d)(3),[16] and contravenes Congress' overarching policy of preempting state taxation to support airport development in favor of federal taxation

[15] The statute does not answer—and this case need not answer—the question whether the "in lieu tax" must be no greater than the tax it replaces. As noted, the Court has spoken of a "just equivalent" test where the question was whether the "in lieu tax" satisfied a claim of unconstitutional discrimination. *See supra* n.10. Similarly, the Court's complementary tax decisions are bottomed on principles of equal treatment. *See supra* n.11. The purpose of § 1513(d), by forbidding discriminatory classifications, is to achieve *less* discrimination than the Constitution permits. *Cf.* Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940). In view of this stricter anti-discriminatory purpose, there would appear to be a requirement of "equivalence" with respect to "in lieu" taxes under § 1513(d)(3).

[16] Section 1513(d) was first proposed by airlines which were seeking the same relief from discriminatory property taxes as railroads and motor carriers. The legislation, however, did not follow the usual course of separate committee consideration and enactment in each house. Instead, it surfaced in the conference report on the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324. *See* H.R. Rep. No. 760, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1190. Such a process does not suggest, or leave much room for, the kind of policy analysis that would underlie the adoption of the "in lieu tax" exception to encourage state financing of airports unrelated to federal development criteria.

to support a federal trust fund for this purpose.[17] In any case, such a view would be at odds with the thrust of the Zorack affidavit and the terms of other state tax statutes at the time. These strongly support the view that the reference in § 1513(d)(3) to the use of funds for airport and aeronautical purposes was included in order to confine the "in lieu tax" exception to the one state—Minnesota—whose Senator stood in the way of enactment.

C. The South Dakota Flight Property Tax Is Not An "In Lieu Tax" Which Substitutes For Personal Property Taxes.

In the courts below the State took the position that the flight property tax was a tax "in lieu of" the South Dakota personal property tax. This view was upheld in the trial court but rejected by the South Dakota Supreme Court on the grounds that the tax is "not a substitute for an *ad valorem* personal property tax." 372 N.W.2d at 109. To the extent that the South Dakota court was construing the State's own statutes and concluding that the South Dakota legislature did not intend the flight property tax to replace other property taxes, *American Oil*, *supra* at 455-56, and similar decisions make that holding "conclusive."

[17] Congress' basic goal in federal airport legislation has been to create *federally* established tests of need, financed by *federal* ticket and excise taxes. As the Court noted in Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 9 (1983), the prohibition on state taxes in § 1513(a) was adopted because "[b]oth Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." Similar reasoning was applicable in 1982 when Congress in the same bill that adopted § 1513(d) reauthorized the federal airport program. Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Title V, 96 Stat. 671. Nor is there any reason that the airlines would have wanted to direct state tax receipts to airport purposes. Airlines have traditionally been concerned about encouraging ambitious airport programs based on civic pride rather than need because they typically pay for oversized airports with oversized landing fees.

Even if this holding is not accepted as conclusive, the South Dakota Supreme Court's key factual finding should be accorded great deference. The South Dakota court found that the 1961 flight property tax was "the first imposition of personal property tax on the airline flight property." 372 N.W.2d at 109. In other words, even though the State had previously (since 1901) had a personal property tax, it had not imposed it or any similar tax upon the aircraft of interstate or international airlines.[18] Thus it is clear that at the time of its enactment the flight property tax was not intended as a substitute for other personal property taxes. In any case the general personal property taxes that the State alleges would otherwise have applied were repealed in 1978. S.D. Codified Laws Ann. § 10-4-6.1 (1982); 1978 S.D. Laws ch. 72 §§ 2, 9.

The State's argument must therefore be that the flight property tax somehow became an "in lieu tax" after 1961 and continued as an "in lieu tax" after 1978. Even if logically plausible, such a conclusion would require some credible showing that the South Dakota legislature intended the tax to be a substitute for a tax that otherwise would have applied. The use of the term "in lieu," while by no means decisive, would have been one such indication of intent, especially since it has been used in a number of other statutes.[19] Such evidence is conspicuously

[18] The State clearly had the power to tax domiciled airlines under Northwest Airlines, Inc. v. Minnesota, *supra*, and, after the decision in Braniff Airways, Inc., *supra*, the power to levy a fairly apportioned tax on the flight property of nondomiciled airlines.

[19] Taxes on the following industries in South Dakota are expressly stated to be "in lieu of" property taxes: express companies (S.D. Codified Laws Ann. § 10-32-2 (1982) (adopted 1925)); telephone companies (S.D. Codified Laws Ann. § 10-33-26 (1982) (adopted 1955)); rural electric companies (S.D. Codified Laws Ann. § 10-36-11 (1982) (adopted 1941)); telegraph companies (S.D. Codified Laws Ann. § 10-34-15 (1982) (adopted 1917; "in lieu of all other taxes")). An original one-time registration tax on non-carrier aircraft is also expressly stated to be "in lieu of" certain other taxes. S.D. Codified Laws Ann. § 50-11-19 (1983 & Supp. 1986) (adopted 1939). References to "in lieu" also appear in the personal property tax itself. S.D. Codified Laws Ann. § 10-6-2.2 (1982) provides that certain exemptions from the tax for household effects and the like "shall not impair or repeal any tax or fee authorized to be levied or imposed *in lieu of* personal property tax." (Emphasis added).

absent, as is all other evidence of intent to accomplish a true substitution for another tax. As for the future, whatever taxes the State might choose to adopt are not relevant here; the essence of the "in lieu" concept is a substitution for an *existing* tax, not an exemption from unspecified future enactments.[20]

D. The South Dakota Flight Property Tax Is Not An "In Lieu Tax" Which Substitutes For Aircraft Registration Taxes. In Any Case The Court Should Decline Jurisdiction Of Any Claim That The Flight Property Tax Substitutes For Registration Taxes.

1. *Jurisdiction should not be accepted.*

In the courts below, the State's only "in lieu" argument was that the flight property tax was imposed in lieu of other personal property taxes. Appellees' Brief to the South Dakota Supreme Court at 13-16, and to the Circuit Court at 11-13. That was the only "in lieu tax" issue

[20] In the lower courts the State cited the language of S.D. Codified Laws Ann. § 10-4-6.1 (1982) which, beginning in 1978, exempted non-centrally assessed personal property from *ad valorem* taxation except that "[t]his exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax." *See* 1978 S.D. Laws ch. 72 §§ 2, 9. That language, however, does not represent, as the State alleged, a determination that the flight property tax is or had been an "in lieu tax." That tax continued in effect by virtue of the previous sentence in § 10-4-6.1, which stated: "Personal property as defined in § 10-4-6 *which is not centrally assessed* is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation." (Emphasis added).

considered and decided by the Circuit Court and the South Dakota Supreme Court.

At oral argument, however, the Attorney General alluded to aircraft registration taxes and implied for the first time that the flight property tax was in lieu of such taxes. There has been no consideration of that contention by the lower courts and, under well established precedent, a construction of state law allegedly in conflict with federal law may not be raised in this Court unless it first was, "set up or claimed in such a way as to bring the subject to the attention of the state court." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). The state court must be given an "opportunity authoritatively to construe" the state statute whose validity is being challenged. *Wilson v. Cook*, 327 U.S. 474, 480 (1946). Failure to raise an issue in the state court is a jurisdictional defect precluding consideration of that issue by this Court. *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382-83 n.6 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

2. *In any case the flight property tax is not in lieu of aircraft registration taxes.*

South Dakota's aircraft registration taxes consist of an annual registration fee of between $15 and $100 per aircraft, S.D. Codified Laws Ann. § 50-11-12 (1983 & Supp. 1986), which is "in lieu of all personal property taxes, general or local, on aircraft authorized by any law or ordinance of this state or any of its political subdivisions . . . ." S.D. Codified Laws Ann. § 50-11-18 (1983). In addition, there is an original registration tax of 4% of the purchase price of any aircraft kept in the State for more than 90 days. S.D. Codified Laws Ann. § 50-11-19 (1983 & Supp. 1986). The latter tax is paid one time regardless of subsequent sale or transfer, and is "in lieu of all occupational, sales, excise, privilege and franchise taxes levied by this state upon the gross receipts from all sales of aircraft." *Id.* Neither tax applies to

any aircraft "which is engaged in regularly scheduled flying constituting an act of interstate or foreign commerce." S.D. Codified Laws Ann. § 50-11-28 (1983).

The South Dakota flight property tax cannot be considered as "in lieu of" these registration fees. The registration fees were enacted in 1949 and have never been applicable to interstate airlines, either before or since the adoption in 1961 of the flight property tax. Absent the element of substitution, there cannot be an "in lieu tax."

In any case the 4% original registration fee and the annual fee of up to $100 per aircraft are themselves "in lieu" taxes. By exempting airlines from the 4% tax the statute makes applicable to airlines any tax that might otherwise apply, such as the 4% general sales and use taxes adopted in 1935 and 1939, respectively. S.D. Codified Laws Ann. ch. 10-45 and 10-46 (1982 & Supp. 1986).[21] The exemption from the annual registration fee simply means that airlines subject to the flight property tax cannot avoid it by paying an annual registration tax.

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[21] From their inception both taxes excepted the sales and use of property which the State is prohibited from taxing "under the Constitution or laws of the United States." S.D. Codified Laws Ann. §§ 10-45-9; 10-46-7 (1982). Even if these exceptions for some reason are construed as prohibiting *any* sales or use taxes on aircraft engaged in interstate commerce, it is clear from the date of their adoption that they were not adopted as part of legislation intended to substitute the flight property tax for sales and use taxes. Moreover, if the sales and use taxes did not apply, the flight property tax would not be an "in lieu tax" because it would not be a substitute for an otherwise applicable tax.

CONCLUSION

The question of whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes" is one of both federal and state law. The South Dakota flight property tax is not such an "in lieu tax."

Respectfully submitted,

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December 8, 1986

APPENDICES

APPENDIX A

STATE OF NORTH DAKOTA
IN DISTRICT COURT
COUNTY OF BURLEIGH
SOUTH CENTRAL JUDICIAL DISTRICT

Civil No. 33697

NORTHWEST AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
FRONTIER AIRLINES, INC.,
Plaintiffs,

vs.

STATE OF NORTH DAKOTA by and through the STATE BOARD OF EQUALIZATION, the STATE TREASURER OF NORTH DAKOTA and the STATE TAX COMMISSIONER OF NORTH DAKOTA,
Defendants.

MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT

This action is before the court on cross motions for summary judgment.

There are no disputed facts. There are disputes dealing with the application of the law to the facts and the conclusions of law to be drawn.

This case concerns the 1982 property tax assessments levied by the State Board of Equalization against the plaintiffs in 1983 under Chapters 57-32 and 57-06, amounting to $320,142.15.

I.

The procedural defense of the State is without merit.

Section 57-32-03 requires the state tax commissioner to file a certified list of the taxes imposed upon the plaintiffs, such filing to be with the state treasurer on or before March 31st. Such taxes are then due on the 15th of April next following the certification.

In this case the certification for the 1982 taxes occurred, not in March 1983, but April 22, 1983. Therefore the taxes were not due until April 15, 1984.

II.

The plaintiffs' argument that the assessment is prohibited by 49 U.S.C. section 1513(d)(1) is without merit.

Within the federalism concept of this republic is the inherent, fundamental principle that this state has plenary power. This sovereign state has all the necessary power and authority to accomplish its goals by legislation. The state constitution is a limitation of that power. The Federal Constitution, however, is a grant of power. Congress, in enacting any federal statute, must find in the Federal Constitution a grant of such power for such statute.

The assessment of airline property in this state is based and found in the North Dakota Constitution, article X, section 4, and then explained and defined by legislation.

Having plenary power, the State has the widest discretion in classifying property, subject only to the standard of uniformity as required in article X, section 5, which is substantially the same as the fourteenth amendment. *Souris River Telephone Mutual Aid Corp. v. State*, 162 N.W.2d 685 (1968).

Congressional encroachment into or limitation of state taxation can only be done if the congressional enactment is grounded in the Federal Constitution. Section 1513(d) attempts to ground itself in the interstate commerce clause. By doing so, both the state constitution requirement of this tax and the interstate commerce clause of the Federal Constitution must "live" in some form of harmony, together with the enactments by the legislative bodies of the two governments.

Only when Congress, acting under a specific or implied grant of authority from the states as found in the Federal Constitution, expresses its purpose clearly can it be said to have changed the state-federal balance. Tribe, *American Constitutional Law*, sections 5-8, p. 242-243 (1978). In other words, Congress must make a clear statement that it has chosen to control a specific subject matter or has pre-empted that subject matter under specific federal constitutional authority, particularly taxing power of the state. Such an enactment arises only from a grant of power to the Congress by the states, such as the commerce clause. This case and the federal enactment do not contain such a "clear statement" and is therefore distinguishable from the railroad statutes involved in *Ogilvie v. N.D. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), cert. den., 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981) and *Trailer Train Co. v. N.D. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983).

This court concludes that it cannot be said that section 1513(d) clearly regulates the State or pre-empts the State's power as to how or if it may impose its tax. The State's plenary power of classification for taxation is governed by the fourteenth amendment. The federal statute here requires no more than is already required: that a state reasonably classify airline property within the parameters of the fourteenth amendment. The assess-

ment of ten percent of true market value is the same for all classified property as defined in Chapter 57-32.

This court concludes that article X, section 4 and Chapters 57-32 and 57-06 are not in conflict with 49 U.S.C. section 1513(d) but are in harmony with the federal enactment.

The court further concludes that the imposition, assessment and collection of this tax is not prohibited by the federal enactment or the interstate commerce clause.

III.

The State's argument that this is an "in lieu" tax is without merit.

The State appears to assert that since the plaintiffs pay no other taxes, this tax is in lieu of such other taxes and therefore fits within the exception of 49 U.S.C. section 1513(d)(3).

"In lieu of" means "instead of."

While Section 57-32-01.1 purports to label the tax in this case as an "in lieu tax," clearly it isn't. There is no other tax that is imposed on airlines. Therefore there is no tax for which this one can be called a substitute or which is instead of another tax. Article X, section 4, specifically requires the assessment of the tax in this case and the manner in which the assessment was made. The legislature does not have the authority to rename this tax. Whatever name the legislature chooses to utilize concerning this tax, its very definition and nature is found in the constitution itself, not in the enacting legislation.

IV.

As a collateral matter, the State has filed a motion to strike three affidavits filed by the plaintiffs in support of the plaintiffs' motion for summary judgment. That motion is granted.

The court grants and orders summary judgment to be entered in behalf of the defendant State of North Dakota.

Dated this 25th day of April, 1984.

BY THE COURT:

/s/ Dennis A. Schneider
DENNIS A. SCHNEIDER
District Judge

APPENDIX B

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH
IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Civil No. ——

NORTHWEST AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
FRONTIER AIRLINES, INC.,
Plaintiffs

vs.

STATE OF NORTH DAKOTA by and through the STATE BOARD OF EQUALIZATION, the STATE TREASURER OF NORTH DAKOTA and the STATE TAX COMMISSIONER OF NORTH DAKOTA,
Defendants.

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Affidavit of John L. Zorack

I John L. Zorack, being duly sworn, depose and say as follows:

1. I am an attorney, a partner in the Washington, D.C. law firm of Cook, Purcell, Henderson and Zorack. In this capacity I represent clients in a variety of legislative matters before the United States Congress.

2. During the spring and summer of 1982 I was closely involved in the passage of the amendments to section 1113(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1513(b)), which ultimately became law as part

of the Tax Equity and Fiscal Responsibility Act ("TEFRA" or "the Act"). TEFRA became effective on September 3, 1982. In particular I was involved in the inclusion of section 532 of the Act, which amended the Federal Aviation Act so as to prohibit a State from assessing or taxing air carrier transportation property at a rate higher than that applied to other comparable commercial and industrial property.

3. The clear purpose of section 532 was to avoid an unreasonable burden on interstate commerce through the imposition of state taxes which discriminate against airlines. The legislation placed the airlines in this respect on the same footing as the nation's railroads and trucking companies—the Railroad Revitalization and Regulatory Reform Act of 1976 and the Motor Carrier Act of 1980 prohibit the States from assessing railroad and trucking property respectively at a rate higher than that prevailing for commercial and industrial property.

4. Section 532 contains a provision stating that the prohibition will not apply "to any in lieu tax which is wholly utilized for airport and aeronautical purposes." This "in lieu" provision was intended to ensure that the Act would not invalidate state taxes which are a legitimate substitute for other taxes on air carrier transportation property and which are not imposed in an effort to tax such property at rates higher than those imposed on other comparable commercial and industrial property. The provision was not contained in early drafts of either the Senate or House versions of section 532 but was inserted at the conference stage. The in lieu provision was inserted to take care of Minnesota's objection to an earlier version. Senator Durenberger and the State of Minnesota submitted the final draft as approved by the conference committee and was needed so that section 532 would not invalidate the Minnesota airflight property tax, Minn. Ann. Stat. § 270.071-079, which is a true in lieu tax imposed with the consent of the relevant airlines

instead of other taxes which would otherwise be levied on airflight property. The language was drafted primarily by officials in the Department of Revenue, State of Minnesota, and was agreed to unanimously by the House-Senate Conference Committee.

5. To my knowledge no other state made any representation at the time that it wished to be protected by the in lieu provision.

/s/ John L. Zorack
JOHN L. ZORACK

Subscribed and sworn to before me this 9th day of November 1983.

/s/ [Illegible]
Notary Public

My Commission Expires:
May 14, 1987

(13)

NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court of the State of South Dakota

APPELLEES' SUPPLEMENTAL BRIEF

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27pp

QUESTIONS DIRECTED BY THE COURT

1. Under 49 U.S.C. Section 1513(d)(3), the subsection "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." Is the question whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes," one of state or federal law?

2. If federal law governs the question whether a tax is an "in lieu tax" under section 1513(d)(3), is the South Dakota Airline Flight Property Tax, South Dakota Codified Laws Ch. 10-29, an "in lieu tax" under section 1513(d)(3)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS

STATUTES

South Dakota Codified Laws:

South Dakota Session Laws

OTHER REFERENCES

NO. 85-732

IN THE

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APPELLEES' SUPPLEMENTAL BRIEF

ARGUMENT

The federal statute in question, 49 U.S.C. 1513(d) declares certain acts to unreasonably burden and discriminate against interstate commerce. These matters and the arguments relating to the definition of commercial and industrial property are in Appellees' original brief.

QUESTION NO. 1 DIRECTED BY THE COURT

1. UNDER 49 U.S.C. SECTION 1513 (d)(3), THE SUBSECTION "SHALL NOT APPLY TO ANY IN LIEU TAX WHICH IS WHOLLY UTILIZED FOR AIRPORT AND AERONAUTICAL PURPOSES." IS THE QUESTION WHETHER A STATE TAX IS AN "IN LIEU TAX WHICH IS WHOLLY UTILIZED FOR AIRPORT AND AERONAUTICAL PURPOSES," ONE OF STATE OR FEDERAL LAW?

GENERALLY

So far as applicable to the question here, it is the general rule that

when a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2. Sola Electric Co. v. Jefferson Electric Company, 317 U.S. 173, 174; 63 S.Ct. 172, 87 L.Ed. 165 (1942).

In that case this Court was called upon to decide whether a doctrine invoked in a lower court was so in conflict with the prohibition of a federal act that the Supreme Court could resolve the question even though its conclusion be contrary to that of a state court.

This Court held that where legal relationships must be deemed governed by federal law the benefit of a federal statute may not be denied by state statutes.

Appellees have not challenged the supremacy of §1513(d) prohibiting general taxation which is burdensome or discriminatory on the one hand but permitting within limits certain forms of taxation on the other hand.

A QUESTION OF FEDERAL LAW

In a case which involved a proviso similar to §1513(d)(3) this Court held that the validity of the tax defined by such proviso was a question of federal law.

In 1969 Congress had authorized states to tax national banks on a limited basis. Banks with principle offices in the taxing states could be subjected to any non-discriminatory tax generally applicable to state banks. However, no tax in effect prior

to January 1, 1973, could be imposed unless the state legislature authorized the same by subsequent "affirmative action". [1] That prohibition, however, did not apply to "any tax on tangible personal property". [2] The state of New York had a commercial rent tax prior to 1969. Subsequent thereto, the New York legislature increased the rate of tax.

The New York Court of Appeals concluded that under New York law, the commercial rent and occupancy tax was a tax on tangible personal property and hence not subject to the prohibitions of the savings

1 12 U.S.C. 548

2 The prohibition also did not apply to any license, registration, transfer, excise or other fee or tax imposed on the ownership, use of transfer of tangible personal property, imposed by a state which does not impose a tax, or an increased rate of tax, in lieu thereof.

clause. [3]

This Court PER CURIAM, held [4] that the commercial rent and occupancy tax was not considered by Congress to be a tax on tangible personal property. The court said at 440 U.S. 449,

> "Whether the tax at issue is a tax on tangible personal property within the meaning of Pub.L. 91-156 is a question of federal law;. . ."

§1513(d) provides a similar exception to a prohibition, i.e "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

SOME AIRLINE TAXES PREEMPTED

In a recent airline tax case this Court reviewed Hawaii's attempt to style a

3 Chase Manhattan Bank v. Finance Administration of the City of New York, 43 N.Y.2d 425, 431; 401 N.Y.S.2d 1002, 1004, 372 N.E.2d 789

4 Chase Manhattan Bank v. Finance Administration for the City of New York, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445, (1979)

gross receipts tax as a property tax measured by gross receipts and to avoid a Congressional prohibition against a ". . . tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . ." [5]

This Court in Aloha Airlines v. Director of Taxation, [6] looked through the title and style of the tax, viewed a federal question and stated:

> "The manner in which the state legislature has described and catagorized §239-6 cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines. . ." contrary to 49 U.S.C. 1513(a).

5 49 U.S.C. 1513(a)
6 464 U.S. 7, 104, S.Ct. 291, 78 L.Ed.2d 10 (1983)

The Court held that a state statute that imposes such a tax is therefore preempted. The court added [7] "Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce. . ."

In the case at bar, on the other hand §1513(d) only prohibits taxes on airlines which are discriminatory when compared to a particular class of property i.e. taxed commercial and industrial property.

§1513(d) does not apply to an in lieu tax wholly utilized for airport or aeronautical purposes. Appellees assert this clearly is a federal question.

QUESTION NO. 2 DIRECTED BY THE COURT

IF FEDERAL LAW GOVERNS THE QUESTION WHETHER A TAX IS AN "IN LIEU TAX" UNDER SECTION 1513(d)(3), IS THE SOUTH DAKOTA AIRLINE FLIGHT PROPERTY TAX, SOUTH

7 Note 10

DAKOTA CODIFIED LAWS CH. 10-29, AN "IN LIEU TAX" UNDER SECTION 1513(d)(3)?

As previously noted, South Dakota since statehood has taxed both real and personal property. Article XI, Section 2 of the State Constitution requires that taxes shall be uniform on property of the same class. Since situs property of airlines in South Dakota prior to 1961 was assessed by local assessors there is no record of what, if any, property was actually subjected to tax. However, the fact remains that the law of the state, SDCL 10-3-17, required that all persons and businesses self-list their personal property, thus the appellation commonly given this tax as the "liars tax".

Situs property continued to be assessed by local assessors until 1978 when, with the general repeal of the business inventory tax, the airlines received the same

benefit on locally assessed personal property enjoyed by the rest of the business community. [8]

To begin with, there is no question that the South Dakota Airline Flight Property Tax is utilized wholly for airport and aeronautical purposes. The statute itself, SDCL 10-29-15, makes this clear. [9] Thus the sole question is, "Is the South Dakota Airline Flight Property Tax an "in lieu" tax?"

With the exception of an income tax, South Dakota has been as resourceful as most other states in spreading the tax burden in a variety of ways. There have been taxes levied on grain and seed, honey beets, sugar cane, transient farmers as well as the more familiar franchise taxes on financial institutions; premiums tax on insurance

8 Ch. 72 and 73, Laws of 1978
9 Appellees' Original Brief, Appendix A, pg. 52.

companies and excise tax on construction contractors.

SOUTH DAKOTA'S MAIN TAX FOR STATE GOVERNMENT IS THE RETAIL SALES TAX

Specifically exempt from the states sales tax are the receipts from transportation services. [10] Those services join approximately seventy-five to one hundred enumerated businesses whose gross receipts are not taxable. Taxable against all users is motor fuel when used on the highways [11] and aviation fuel used in the state whether by private or public aircraft. [12] Not taxable is motor fuel used off the highways. [13] This would include airport vehicles when used only on runways for example. Only vehicles used on the public highways are subject to an

10 §10-45-12.1
11 §10-47-2
12 §10-47-65 - This tax is all used for aeronautical purposes.
13 §10-47-44

annual license fee. [14] Aircraft not used in air commerce is subject to an annual license fee as well as a one time registration charge. [15]

LOCAL GOVERNMENT RELIES ON PROPERTY TAX

The general revenue tax for local government in South Dakota is the property tax. Except for centrally assessed property [16] it is administered by local officials. Some municipalities have imposed local sales taxes but are bound by the state exemption laws. [17] Property which is centrally assessed by the state also contributes to the general revenue funds of the county, city and school district entities of government.

Centrally assessed property of utilities includes a unit assessment of both real and personal property of the company

14 §32-5-6
15 §50-11-12, 50-11-19 - commercial aircraft exempt 50-11-28
16 §10-28 to 10-38
17 §10-52-4

with one exception. Personal property of railroads is not assessed based upon South Dakota's understanding of the meaning of 49 U.S.C. 11503 and the interpretation of the "catch-all" clause of 49 U.S.C. 11503(b)(4). [18] All of the tax dollars generated by centrally assessed property other than airlines go into the general revenue of the local governments. Under state law all such assessments are equalized with the assessments made by local assessors. [19]

49 U.S.C. 1513(b) and 1513(d)(A), (B) and (C) address and identify taxes which serve the purpose of raising revenue for general government, state and local; property taxes, net income taxes, franchise taxes and

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18 Ogilvie v. State Board of Equalization, 657 F.2d 204 (Cert. den) 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981)

19 Appellees' Initial Brief, pg. 38 to 43

sales and use taxes on the sale of goods and services.

By the amendment in the 1982 Tax Equity and Fiscal Responsibility Act, Section 532, the Congress specifically addressed discrimination in the ad valorem property tax field. [20]

Government should not be permitted to favor one business over another, where uniformity of taxation is mandated as it is in the South Dakota Constitution for ad valorem taxes [21] hence §1513(d)(A), (B), and (C) specifically prohibit certain tax practices when it comes to the general revenue laws.

IN LIEU TAXES PERMITTED

Realizing that not all states assess airlines for general revenue purposes

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20 U.S. Senate Committee on Commerce letter to President of Air Transport Association of America - Jurisdictional Statement, pg. 11a.

21 Article XI, Section 2

Appellees believe Congress added Subsection (d)(3) to permit tax other than a general revenue tax when that tax is utilized wholly for airport and aeronautical purposes.

The Airline Flight Property Tax in South Dakota is in lieu of that general revenue tax which other commercial and industrial property pays. No local governmental entity receives a penny of the Flight Property Tax for its general government operations. In 1978, when the South Dakota legislature repealed the personal property tax, it recognized the inherent difference between local assessments and centrally assessed property. Specifically the legislature provided in SDCL 10-4-6.1 that:

> "Personal property as defined in §10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax."

The legislature also limited any increase in the effective growth of centrally assessed taxes which might be considered on personal property by providing a maximum rate of growth for taxes imposed on the personal property of such utilities. [22] While centrally assessed property includes a valuation for the personalty of the particular business with the exception of railroads, that personalty can never be equalized at more than one hundred twenty-five percent of its 1978 valuation.

REPEAL OF PERSONAL PROPERTY TAX DID NOT IMPAIR AN IN LIEU TAX

It is the position of the Appellees that the recognition and adoption by the legislature in 1978, of a statute stating

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22 SDCL 10-6-34.1, App. A

that the repeal of business inventory taxes and the exemption of other personal property taxes shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax is ample recognition of the fact that the taxes which remained thereafter obviously were in lieu of those which were repealed.

Appellees appreciate the Court's decision to review a state Court's characterization of the tax as in the case of Wagner v. Covington, 251 U.S. 95, 40 S.Ct. 93, 64 L.Ed. 157 (1919),

> "When this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced.

Appellees urge the Court to recognize that the practical effect and result is that no other tax is applicable to the business of this company as an interstate airline.

NO DENIAL OF EQUAL PROTECTION

This Court has recognized differences among states imposing business taxes and has long upheld a diversity of tax schemes against arguments of equal protection.

In the case of Lehnhausen v. Lake Shore Auto Parts Company, [23] this court discussed a tax scheme in Illinois very much like that in South Dakota where personal property taxes were lifted from the code and a variety of other measures left in place. A property tax on corporations was upheld after the people of the state exempted the property of individuals. Illinois of course, has an

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23 410 U.S. 356, 93 S.Ct. 1001 (1973)

income tax on corporations as opposed to no such levy in South Dakota.

South Dakota has imposed not a general revenue tax on airlines but a tax in lieu of a general tax; measured by certain use factors in the state and devoted solely to the airports which are utilized by the taxpaying airlines.

49 U.S.C. 1513(d) in Sections (A) (B) and (C) deal with characteristics of taxes used for general revenue purposes. §1513(d)(3) permits a tax which is to be used for airport and aeronautical purposes but not for the general use of the government. The South Dakota tax is just that; "in lieu" of the other tax impositions and dedicated to the support of the facilities used by the taxpayer.

CONCLUSION

If the South Dakota Airline Flight Property Tax is struck down airlines will pay

no tax for the business they do in this state. Although discrimination in taxation led Congress to preempt certain tax practices, it nevertheless recognized the unique nature of airlines and permitted limited taxation when the proceeds are dedicated for airport and aeronautical purposes. South Dakota's tax should be held by this Court to be such a tax.

Respectfully submitted,

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APPENDIX A

10-6-34.1. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized in the respective taxing districts in 1977, but not to exceed the maximum percentage as provided in §10-6-33. Centrally assessed real property shall be assessed and equalized at the same percentage as other real property in the county.

Source: SL 1978, Ch 72, §14.

No. 85-732

In the Supreme Court of the United States

OCTOBER TERM, 1986

WESTERN AIR LINES, INC., ET AL., APPELLANTS

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Under 49 U.S.C. App. 1513(d)(3), the provisions of Section 1513(d)(1) "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." The first question presented is whether the status of a state tax as an "in lieu tax which is wholly utilized for airport and aeronautical purposes" is governed by state or by federal law.

2. If federal law governs this determination, whether the South Dakota Airline Flight Property Tax, S.D. Codified Laws Ann. ch. 10-29 (1982), is an "in lieu tax" within the meaning of Section 1513(d)(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and statutes—Continued: Page

Constitution and statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-732

WESTERN AIR LINES, INC., ET AL., APPELLANTS

v.

BOARD OF EQUALIZATION OF THE
STATE OF SOUTH DAKOTA, ET AL.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of November 17, 1986, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. These are consolidated suits brought by appellants, four interstate air carriers, seeking refund of state taxes imposed for the years 1982 and 1983 upon an apportioned fraction of the value of "flight property" used in South Dakota. South Dakota's "flight property tax," like its taxes levied on nine other categories of public utility companies, is centrally as-

sessed by the state's Department of Revenue. S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982). Appellants contend that this tax violates the limitations on state taxation of interstate airlines established by Congress in 49 U.S.C. App. 1513(d).

Section 1513 was enacted in 1973 to address congressional concern that state taxation of airlines was unreasonably burdening interstate commerce. The statute as originally enacted expressly prohibited the imposition of specific types of taxes, including head taxes and gross receipts taxes, on interstate airlines. See 49 U.S.C. App. 1513(a); see generally *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 8-10 (1983). In 1982, Congress added Section 1513 (d), the provision at issue here, to address another form of state taxation that it viewed as unreasonably burdening interstate commerce. That subsection generally prohibits a state from imposing an ad valorem tax on air carrier transportation property at assessed values or rates higher than those applicable to other commercial and industrial property of the same type. Section 1513(d)(3) provides, however, that "[t]his subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

The South Dakota flight property tax was passed in 1961. It provides that "flight property" (defined as fully equipped aircraft used in interstate transportation) "shall be assessed for the purpose of taxation by the department of revenue and not otherwise." S.D. Codified Laws Ann. § 10-29-1(4) (1982). It thus excludes "flight property" from the general South Dakota scheme of local property tax assessment at the county level (*id.* § 10-3-16). The statute establishes a complicated formula (based on flight

tonnage, flight time, and revenue ton miles) for determining the portion of the aircraft's value that is subject to South Dakota tax (*id.* § 10-29-10). That value is then taxed at the state's "average mill rate" (*id.* § 10-29-14). Finally, the statute provides that all revenues from this tax are to be allocated to the airports where the taxed airline companies make regularly scheduled landings and "shall be used exclusively by such airports for airport purposes" (*id.* § 10-29-15).

In 1978, South Dakota exempted from ad valorem taxation all personal property—chiefly householders' property and business inventories—that was locally rather than centrally assessed. The statute effecting that exemption specifically provided, however, that it did not "impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax" (S.D. Codified Laws Ann. § 10-4-6.1 (1982)). Thus, while exempting airlines' locally-assessed personal property from tax (J.S. App. 7a n.1), it is unquestioned that the 1978 amendment left in place the centrally-assessed tax on airline "flight property," as well as the state's other centrally-assessed taxes on public utility companies. Appellants' contention is that the resulting South Dakota tax structure, in which the centrally-assessed flight property tax continues to be collected, but the locally-assessed personal property tax is no longer collected, violates Section 1513(d).

2. The South Dakota circuit court rejected appellants' contention that the flight property tax violates federal law (J.S. App. 13a-21a). The court held that the tax was an "in lieu tax which is wholly utilized for airport and aeronautical purposes" within the meaning of 49 U.S.C. App. 1513(d)(3). The court noted that South Dakota had chosen to tax a number

of utilities, such as railroads, pipelines, telephone companies, electric companies, water companies, express companies and "private car-line companies," by assessing their property on a unit basis rather than by means of the generally applicable method of local assessment. See J.S. App. 20a, citing S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982). The court held that all of these centrally-assessed taxes constitutes "in lieu taxes" within the meaning of the federal statute, emphasizing that they had been so characterized by the South Dakota legislature when it preserved them upon eliminating the locally-assessed tax in 1978. See J.S. App. 19a-20a, quoting S.D. Codified Laws Ann. § 10-4-6.1 (1982). In the circuit court's view, the airline flight property tax was one example of South Dakota's "in lieu taxes" on utilities, and, because the proceeds of the tax are devoted exclusively to airport purposes, the court concluded that it fell within the proviso of Section 1513 (d)(3) and hence was not prohibited by Section 1513(d). J.S. App. 19a-20a.[1]

The Supreme Court of South Dakota affirmed on a different ground, one judge dissenting (J.S. App. 1a-11a). It stated that the federal statute "essentially prohibits a discriminatory tax rate as between air carrier property and other commercial and industrial property," with the latter being defined as "property * * * devoted to a commercial or industrial use and *subject to a property tax levy*" (J.S. App. 7a (emphasis in original), citing 49 U.S.C.

[1] In an administrative proceeding to abate collection of the flight property tax, the South Dakota Board of Equalization had previously concluded that the tax was an "in lieu tax" governed by the Section 1513(d)(3) proviso (J.A. 30-31).

App. 1513(d)(2)(D)). Because South Dakota had exempted locally-assessed personal property from ad valorem tax in 1978, the court concluded that such property was not "subject to a property tax levy" within the meaning of Section 1513(d)(2)(D), and hence that it should not be taken into account for purposes of the comparison mandated by Section 1513(d)(1). And because there was no contention that airline flight property was assessed or taxed at a rate higher than other centrally-assessed property, the court concluded that the flight property tax satisfied the federal statutory strictures (J.S. App. 6a-9a).[2]

As a preliminary matter, however, the South Dakota Supreme Court rejected the circuit court's conclusion that the flight property tax was governed by the proviso of Section 1513(d)(3). The supreme court expressed the view that an "in lieu tax" must be "a substitute for" another existing tax (J.S. App. 5a). The court concluded that the flight property tax did not qualify under that definition because it was the first personal property tax imposed upon aircraft in South Dakota, such airframes having been immune from tax prior to 1961. See *id.* at 5a-6a. Because the flight property tax upon its enactment in 1961 was "an additional tax to the personal property taxes theretofore existing" (*id.* at 6a), the court held that the tax did not qualify as an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3).

[2] We have not been requested to address this question and take no position in this brief on whether this aspect of the South Dakota Supreme Court's decision correctly interprets the federal statute.

ARGUMENT

A. The Question Whether A State Tax Is An "In Lieu Tax Which Is Wholly Utilized For Airport and Aeronautical Purposes" Within The Meaning of 49 U.S.C. App. 1513(d)(3) Is One Of Federal Law

When Congress employs a descriptive phrase in enacting a federal statute, the fact that the application of the statute is nationwide gives rise to a strong presumption, absent some plain indication to the contrary, that the statute should be applied uniformly throughout the Nation, and not be dependent upon the vagaries of local terminology or upon the varieties of state law. *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). Thus, the meaning of the words used in a federal statute is generally a question of federal law, albeit one that may require some inquiry into the particular situation existing in a particular state.

The Court has recognized this basic principle in a variety of contexts. For example, when the incidence of the federal estate tax depended upon the existence of a "general power of appointment" (see I.R.C. § 2041(b)(1)), the fact that a particular power of appointment was "special" under state law was not dispositive. Rather, the meaning of the phrase was held to be a federal question "no matter what name is given to the interest or right by state law." *Morgan* v. *Commissioner*, 309 U.S. 78, 81 (1940). The Court has similarly held that, while "state law controls in determining the nature of the legal interest" that a taxpayer has in property (*Aquilino* v. *United States*, 363 U.S. 509, 513 (1960)), the question whether "a state-law right constitutes 'property' or 'rights to property,'" as those words are used in Section 6331 of the Internal Revenue Code, governing levies, "is a matter of federal law." *United States* v.

National Bank of Commerce, No. 84-498 (June 26, 1985), slip op. 13. See also *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983); *Chase Manhattan Bank* v. *Finance Administration*, 440 U.S. 447, 449 (1979); *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 602-604 (1971); *First Agricultural Nat'l Bank* v. *Tax Commission*, 392 U.S. 339, 347 (1968).

In this case, it seems particularly clear that the construction of 49 U.S.C. App. 1513(d) presents solely a federal question because that statute, like its analogues with respect to railroads (49 U.S.C. 11503) and motor carriers (49 U.S.C. 11503a), was designed to produce some measure of equal treatment in an area where, absent federal legislation, this Court has held that the Constitution did not require equality of treatment. See H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. 722 (1982); compare *Nashville C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 367-369 (1940). That congressional purpose would be substantially undermined if a state's characterization of its tax were conclusive upon the meaning of the federal statute. Indeed, this Court has already held, in connection with another subsection of 49 U.S.C. App. 1513, that a state's characterization of its tax does not control the interpretation of the federal law. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. at 13-14. Thus, we think it clear that the question whether the South Dakota flight property tax is an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3) is one of federal law.[3]

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[3] We note our belief that the question whether South Dakota's tax can be sustained under the Section 1513(d)(3) proviso, although not originally briefed by the parties in this

B. The South Dakota Flight Property Tax Is An "In Lieu Tax" Covered By The Proviso Of 49 U.S.C. App. 1513(d)(3)

We are frank to admit that the meaning of the term "in lieu tax" as used in Section 1513(d)(3) is not without ambiguity. The proviso containing that phrase was added to the statute in conference, and there is no legislative history that specifically addresses it. Nor does the term "in lieu tax" have a well-established meaning elsewhere in the United States Code that can reasonably be imported here. Whether one is operating in English or in French, the meaning ascribed to the term by the court below —namely, a substitute for a pre-existing tax actually imposed upon the taxpayer—would not seem irrational as an abstract matter. In light of the overall purposes of Section 1513(d), however, and in light of the particular context in which the term is used here, it is our view that a broader interpretation of "in lieu tax" is by far the better reading of the statute. We submit that when a state imposes upon a taxpayer a special form or method of taxation in place of that generally imposed (whether or not the taxpayer at that time had been subjected to the generally applicable tax), the tax is an "in lieu tax" for purposes of Section 1513(d)(3). Accordingly, the South Dakota flight property tax is an "in lieu tax" within the meaning of that statute.

1. As the legislative history indicates (see H.R. Conf. Rep. 97-760, *supra*, at 722), Section 1513(d) was enacted in order to extend to airlines the protection against burdensome state taxation that had

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Court, is properly before this Court as an alternative ground for affirmance. That question was briefed, argued, and considered in both courts below.

previously been conferred upon motor carriers and railroads. This provision, like its predecessors, was addressed to a specific problem—the imposition by states of ad valorem property taxes that discriminated against interstate carriers, either by assessing their property at disproportionately high values or by taxing them at higher rates than those applicable to other commercial and industrial enterprises. Congress explained that "interstate carriers * * * are easy prey for State and local tax assessors" because they "are non-voting, often nonresident targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. 91-630, 91st Cong., 1st Sess. 3 (1969). Congress declared that these discriminatory tax practices directed against interstate airlines "unreasonably burden and discriminate against interstate commerce" (49 U.S.C. App. 1513(d)(1)).

While Congress found that states had often discriminated against interstate carriers through the application of their general property tax regimes in the manner specifically proscribed by Section 1513(d)(1), Congress recognized that there were other ways in which state taxes could discriminate in a fashion that would unreasonably burden interstate commerce. Many states had imposed special taxes, particularly on utilities and common carriers, that operated differently from the standard ad valorem property tax because of the peculiarities of valuing property in those industries. Congress recognized that such differential classification of interstate carriers—that is, exempting them from the generally-applicable ad valorem property tax and subjecting them to sui generis tax regimes—could become a disguise for discrimination. Congress accordingly de-

leted from the railroad nondiscrimination statute (49 U.S.C. 11503) a provision that would have made it inapplicable where such differential classifications were set forth in the state's constitution. See S. Rep. 94-595, 94th Cong., 2d Sess. 166 (1976). As an earlier House Report stated (H.R. Rep. 94-725, 94th Cong., 1st Sess. 78 (1975) (emphasis added)):

> In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes that discriminatory property *and "in lieu" taxation* should be ended.

Thus, Congress appears to have viewed these special industry taxes as "in lieu taxes" and recognized that they could burden interstate commerce. On the other hand, in the airline context, Congress has made the judgment in Section 1513(d)(3) that a certain class of in lieu taxes—taxes "wholly utilized for airport and aeronautical purposes"—should be excluded from the mathematical comparison standard of Section 1513(d)(1) because they do not burden interstate commerce.

The South Dakota tax scheme well illustrates the interplay between generally applicable ad valorem taxation and specialized methods of taxation for individual industries. The South Dakota Constitution, Article XI, § 2, authorizes the legislature to classify property for purposes of taxation. Section 10-3-16 of the South Dakota Codified Laws Annotated provides that each county shall be an assessment district, which shall assess for taxation all property situated in the county that is subject to taxation, except property that the Department of Revenue has been directed to assess. Other provisions of Chapters 10-3 and 10-6 set forth a comprehensive administrative procedure applicable to locally-assessed taxes.

In place of the local assessment of ad valorem taxes generally applicable, however, ten distinct chapters of the South Dakota statutes impose ten different systems of centrally-assessed taxation with respect to some or all of the property of ten specified types of enterprise, to the exclusion of the otherwise applicable locally-assessed ad valorem taxes. See S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982).[4] Each chapter sets up its own special regime for the particular enterprise, and there are substantial differences in the operation of the taxes. Some measure the value of property by reference to gross receipts (*e.g.*, *id.* §§ 10-31-2, 10-33-11 and 10-35-9), others by partial reference to the value of franchises and privileges (§§ 10-33-11 and 10-35-9), still others by partial reference to stock and bond values (§§ 10-28-13 and 10-34-3). In the case of the flight property tax, value is measured by a complicated formula that apportions the value of aircraft used both within and without the state (§ 10-29-10). The language used to describe the various centrally-assessed taxes also differs. Several taxes are expressly denominated as being "in lieu of" other taxes (*e.g.*, §§ 10-32-4(6), 10-33-26 and 10-34-15), other chapters state that the

[4] The provisions are chapters 10-28 (Railroad Operating Property), 10-29 (Airline Flight Property), 10-31 (Private Car-Line Companies), 10-32 (Express Companies), 10-33 (Telephone Companies), 10-34 (Telegraph Companies), 10-35 (Electric, Heating, Water and Gas Companies), 10-36 (Rural Electric Companies), 10-36A (Rural Water Supply Companies), and 10-37 (Pipeline Companies). A separate administrative procedure for each of these centrally-assessed taxes is established in Chapter 10-38.

taxes are to be centrally assessed "and not otherwise" (§§ 10-28-1, 10-29-2 and 10-35-2), and one chapter says only that the property shall be taxed "as herein provided" (§ 10-37-1).

Despite these superficial differences, all of these taxes share one common attribute—they are specially imposed on a particular type of enterprise through a central assessment that displaces the otherwise applicable method of taxation. In our view, the South Dakota circuit court correctly concluded that each of these taxes is an "in lieu" tax in the sense that it sets forth the exclusive method of taxing a particular type of property, to the exclusion of all other methods actually or potentially applicable. We believe that Congress used the term "in lieu tax" as a descriptive phrase to refer to special taxes targeted at particular interstate industries. South Dakota's flight property tax, which is paid exclusively by interstate air carriers, is thus an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3).

2. For the reasons stated above, Congress did not intend to shield South Dakota's flight property tax from scrutiny under Section 1513(d) on the ground, without more, that it is an "in lieu tax" rather than a generally-applicable ad valorem property tax. Section 1513(d)(3), however, establishes a standard for assessing the reasonableness of certain in lieu taxes. It provides that Section 1513(d)(1) "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." It appears to be undisputed that South Dakota's flight property tax is so utilized. South Dakota's law mandates that all flight property tax revenues be allocated to the airports at which the taxed airlines make regularly scheduled landings; the formula governing this allocation ensures that each airline's taxes will be directed more or less ratably to a given airport depending on the airline's actual use of that airport. See S.D. Codified Laws Ann. § 10-29-15 (1982). The state law further provides that "the taxes imposed by this chapter * * * shall be used exclusively by such airports for airport purposes" (*ibid.*). South Dakota's flight property tax is thus an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and hence is valid under the proviso set forth in Section 1513(d)(3).

This conclusion is not altered by the fact that South Dakota no longer collects a locally-assessed ad valorem personal property tax. Despite the repeal of that levy, it remains true that the flight property tax is a special, centrally-assessed tax that applies exclusively to a single type of enterprise, a tax that is imposed in lieu of other taxes actually or potentially applicable. The flight property tax, of course, cannot be said to be "equivalent" in any sense to the locally-assessed tax now that the latter has been repealed (although there is no reason to doubt that the flight property tax is roughly equivalent to the other in lieu taxes imposed on other utilities). But the Section 1513(d)(3) proviso does not impose an equivalency test, or even a nondiscrimination test. Rather, it says that the usual nondiscrimination formulas of Section 1513(d)(1) are called off when the proceeds of an in lieu tax are "wholly utilized for airport and aeronautical purposes." That is the case here. Indeed, if the validity of an airline "in lieu tax" devoted to airport purposes hinged on its equivalence to property taxes paid by other businesses, there would have been no point in Congress's including the Section 1513(d)(3) proviso, for such an "in lieu tax" would pass muster under the general nondiscrimination rules of Section 1513(d)(1).

3. Our construction of the Section 1513(d)(3) proviso is fully consonant with Congress's purpose in enacting the statute. Section 1513(d) is designed to prohibit state taxes that unreasonably burden interstate commerce. It is quite logical to conclude that South Dakota's tax on interstate aircraft, whose modest proceeds—$195,000 from all airlines for 1983 (J.S. App. 26a)—are devoted exclusively to airport improvement, does not burden interstate commerce. More specifically, the thrust of Section 1513(d) in prohibiting discriminatory taxation is to ensure that interstate carriers are not required to pay more than their fair share to support the general welfare of the state. Congress intended that interstate carriers, whom it found to be "easy prey" for local tax assessors because they could not vote with their feet, or even vote at all (S. Rep. 91-630, *supra*, at 3), should not be made to subsidize general ratepayers by paying, in effect, for services that the carriers do not receive. Where a discriminatory property tax is levied on an airline or railroad, the discriminatory portion of the tax represents a direct subsidy paid by the carrier to defray the costs of social services (such as fire protection, garbage collection, and schools) consumed by the general citizenry.

The situation is altogether different where (as here) a special-purpose tax is levied on a particular industry, with all the revenues being recycled to benefit that particular industry. South Dakota's flight property tax does not require airlines to subsidize general welfare spending, because the proceeds of the tax are spent exclusively on airports. Conversely, the fact that airlines alone pay the flight property tax does not unfairly burden them (or burden interstate commerce), because the airlines directly benefit from the tax via improvements to the facilities in which they conduct their business. For these reasons, the flight property tax cannot be said to "discriminate" against airlines in the sense that Congress sought to prohibit.[5]

What appellants actually seek in this case is not freedom from discrimination, but rather a requirement that South Dakota discriminate in their favor. To the extent that airlines have personal property (other than aircraft) in South Dakota that was for-

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[5] The legislative history of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823, which enacted a ban on discriminatory state taxation of motor carriers (49 U.S.C. 11503a) similar to that involved here, shows that Congress did not view as a threat to interstate commerce taxes imposed on a particular industry, where the revenues are set aside exclusively for the maintenance and improvement of facilities used by that industry. The House Report on that law (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 45 (1980)) states: "The provisions of [49 U.S.C. 11503a] do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. * * * [T]he proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance, or operation." The absence from the Motor Carrier Act, as from Section 1513(d), of the railroad Act's catch-all prohibition against "any other tax which results in discriminatory treatment of a common carrier by railroad" (Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 54, recodified at 49 U.S.C. 11503(b)(4)), reflects Congress's intent to preserve such special-purpose taxes paid by motor carriers and airlines and used to fund highways and airports, respectively. There is, generally speaking, no analogous species of tax paid by railroads, since railroad tracks and stations, unlike highways and airports, historically have been privately, rather than publicly, owned.

merly subject to the locally-assessed property tax, airlines received the same benefit from the 1978 repeal of the locally-assessed tax that other commercial taxpayers received. The only tax that now remains on airline property is the flight property tax. Appellants' argument in essence is that South Dakota cannot subject them to a flight property tax, the proceeds of which are used exclusively to pay for airports, unless South Dakota subjects all other businesses in the State to a personal property tax, the proceeds of which would necessarily be used to pay for general welfare spending. But since appellants benefit proportionately from general welfare spending, as well as benefiting disproportionately from airport spending, the logic of their position is that everybody else in the state should subsidize *them*.[6] Section 1513(d) was not intended to require, and does not in fact require, this sort of discrimination.

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[6] Airline passengers, of course, do contribute to the maintenance of airports by paying taxes incorporated into the airline tickets they purchase, the proceeds of which go into the federal airport trust fund. See 26 U.S.C. 4261-4263, 7275; 49 U.S.C. App. 2201 *et seq.*

CONCLUSION

The South Dakota Airline Flight Property Tax, South Dakota Codified Laws Ann. ch. 10-29 (1982), is an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3). The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

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DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40131